



Education & Skills
Funding Agency

Agreement Type	Non-Maintained Special Schools (NMSS)
Funding Period	1 st August 2023 to 31 st July 2024
Between	the Secretary of State for Education
And	«ProviderName»
Funding for	«FSPGroupList»
Master Agreement Number	«MasterContractRef»

ACCEPTANCE BY THE NMSS

BY ACCEPTING THIS AGREEMENT VIA THE MANAGE YOUR EDUCATION & SKILLS FUNDING SERVICE THE PERSON TAKING THIS ACTION ON BEHALF OF THE NMSS REPRESENTS AND WARRANTS THAT THE NMSS HAS READ AND UNDERSTOOD THIS AGREEMENT, THE NMSS AGREES TO BE BOUND BY THIS AGREEMENT AND THAT HE/SHE IS DULY AUTHORISED TO ACCEPT THIS AGREEMENT AND LEGALLY BIND THE NMSS.

**SIGNED FOR AND ON BEHALF OF
THE SECRETARY OF STATE FOR EDUCATION**

by David Withey, Chief Executive of the Education and Skills Funding Agency

This Agreement is made on the date the Agreement is digitally signed by the NMSS on the Manage Your Education & Skills Funding Service between:

«ProviderName»
«ProviderAddress»

«ProviderCompanyNo»

AND

THE SECRETARY OF STATE FOR
EDUCATION
DEPARTMENT FOR EDUCATION
20 GREAT SMITH STREET
LONDON
SW1P 3BT

Hereinafter called
the NMSS

Hereinafter called
the Department

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PART 1: PRELIMINARIES

1 DEFINITIONS

“Account Manager”	the person appointed by the NMSS in accordance with Clause 16.2 (Account Manager);
“Agreement Date”	the date of this Agreement;
“Agreement Manager”	the person appointed by the Department in accordance with Clause 16.1 (Agreement Manager);
“Agreement Period”	means the period between the Agreement Date and the Expiry Date, unless terminated earlier on the Termination Date;
“Agreement”	means the Agreement between the above named parties consisting of these Terms and Conditions, the Specification and any other documents (or parts thereof) specified in the Agreement and any variations to the Agreement agreed in writing and signed by both Parties;
“ASBOs”	an anti-social behaviour order as defined in the Crime and Disorder Act 1998;
“Awarding Organisation”	an organisation that is regulated by Ofqual or is recognised by QAA as an access validating agency;
“Barred List”	means the list of individuals who are barred from engaging in regulated activity with children, adults or both in England and Wales maintained by the Disclosure and Barring Service.
“Brokerage”	means the provision by a third party of services, for a fee, to source Sub-Contractors to provide the Services on behalf of the NMSS.
“Business Continuity Plan”	any plan prepared pursuant to Clause 4.1 (Business Continuity), as may be amended from time to time;
“Change in Control”	<p>means (1) any event where any single person or group of persons acting in concert (within the meaning of the City Code on Takeovers and Mergers) acquires any direct or indirect legal and/or beneficial interest in the share capital (as defined in Section 545 of the Companies Act 2006) of the NMSS as a result of which that person or group of persons has a direct or indirect interest in more than 25% of the share capital of the NMSS; and/or</p> <p>(2) A change in the top two tiers of the management team of the NMSS.</p>

“Change”	any change to the Services as advised by the Department;
“Child” or “Children”	shall have the meaning given to it in Section 60 of the Safeguarding Vulnerable Groups Act 2006;
“Combined Authority”	means an authority established under section 103(1) of the Local Democracy, Economic Development and Construction Act 2009 or an authority to which a delegation of the Secretary of State’s functions has been made under section 39A of the Greater London Authority Act 1999;
“Confidential Information”	means any information, including Personal Data as defined by the Data Protection Legislation, and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, and suppliers of the Parties including all IPRs, together with all information derived from any of the above, and any other information clearly designated as being confidential or which ought reasonably be considered to be confidential (whether or not it is marked "confidential");
“Contracts Finder”	means the Government’s publishing portal for public sector procurement opportunities;
“Controller”	takes the meaning given in the GDPR;
“Convictions”	other than for minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding over orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order, or is a Barred person in accordance with section 3 of the Safeguarding Vulnerable Groups Act 2006;
“Crown Body”	means any department, office or agency of the Crown, including Ofsted, the Care Quality Commission, the Charity Commission, the Office for Students, Ofqual, any and all local authority or Combined Authority bodies;
“Data Protection Legislation”	(i) the UK GDPR as amended from time to time; (ii) the Data Protection Act 2018 as amended from time to time; (iii) Regulations made under the Data Protection Act 2018; and (iv) all applicable Law about the Processing of Personal Data;
“Data Subject”	takes the meaning given in the GDPR;
“Database”	the rights in or to the data held in the NMSS’s system in accordance with the Specification;

“Department”	means the Secretary of State for Education acting through the Department for Education and / or Education and Skills Funding Agency (ESFA) as appropriate;
“Department Data”	Means any data (including metadata), record, document or information howsoever stored which is either: (a) communicated by the Department, its staff, Sub-Contractors and agents to the NMSS in writing, orally, electronically or by any other means relating to the Pupils and/or Services provided to the Pupils; or (b) is obtained, gleaned, compiled or processed by the NMSS during the course of the NMSS providing the Services relating to or provided to the Pupils, including Personal Data for which the Department is the data controller. including but not limited to School Census and e-portfolios;
“Department Policies”	the policies of the Department referred to in Schedule 7 (Security & Department Policies) and any other policies of the Department including but not limited to the ESFA policy on funding higher risk organisations and Sub-Contractors in force as at the Agreement Date and amended from time to time;
“Department Related Party”	means any officer, agent, worker, employee of the Department acting in the course of their office, engagement or employment in relation to the Services;
“Department System”	means the Department’s computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Department or the NMSS in connection with this Agreement which is owned by or licensed to the Department by a third party and which interfaces with the NMSS System or which is necessary for the Department to receive the Services;
“Disclosure and Barring Service or DBS”	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
“Dispute Resolution Procedure”	means the procedure for resolving disputes as set out in Clause 17 (Dispute Resolution);
“DPA 2018”	Data Protection Act 2018;
“EIR”	means the Environmental Information Regulations 2004;
“Employment Regulations”	means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or

	replaced or any other Regulation implementing the Acquired Rights Directive 77/187/EC;
“Exempt Information”	means any information or class of information (including but not limited to any document, report, Agreement or other material containing information) relating to this Agreement or otherwise relating to the NMSS, which potentially falls within an exemption to FOIA (as set out therein);
“Exemption Case”	means the case submitted by the NMSS to the Department in accordance with “Subcontracting threshold and exemption cases” of the Sub-Contracting Funding Rules for permission to exceed the Sub-Contracting Threshold;
“Expiry Date”	means 31 July 2024;
“Financial Year”	means a period of 12 months starting on 1 April and ending on 31 March;
“FOIA Notice”	means a decision notice, enforcement notice and/or an information notice;
“FOIA”	means the Freedom of Information Act 2000 and all regulations made thereunder from time to time or any superseding or amending enactment and regulations, and words and expressions defined in the FOIA shall have the same meaning in Clause 23 (Freedom of Information and Confidentiality);
“Funding”	means the funding paid to the NMSS by the Department in accordance with this Agreement and the Funding Rules for the delivery of the Services;
“Funding Agreement”	means the table as set out in Schedule 2 (Payment);
“Funding Higher Risk Organisations Policy”	means the policy described in Schedule 9: Sub-Contracting and available at Funding higher risk organisations and subcontractors policy - GOV.UK (www.gov.uk)
“Funding Period”	means the period set out on page 1 of this Agreement.
“Funding Rules”	means the documents produced by the Department which set out the detailed requirements with which the NMSS must comply in respect of the Services delivered under this Agreement as may be amended by the Department from time to time and as referred to in the Specification (Schedule 1).

“Funding Stream”	means each stream of Funding as set out in Schedule 2 (Payment);
“Funding Year”	means a period of 12 months starting on 1 August and ending on 31 July;
“Good Industry Practice”	means the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector;
“Guidance”	any applicable guidance or directions with which the NMSS is bound to comply, including that issued by the Department;
“High Needs Learner”	means a young person aged 19 to 25 who is subject to an Education Health and Care Plan and who’s placed in the NMSS by an English local authority;
“High Needs Pupil”	means a child aged 18 or under who is subject to an Education Health and Care Plan and who is placed in the NMSS by an English local authority;
“Incident Response Plan”	means each Party’s operational plan for response to and recovery from Significant Incidents or Emergencies as identified in national, local and community risk registers and in accordance with the requirements of the Civil Contingencies Act 2004;
“Indirect Losses”	means loss of profits, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature;
“Insolvency Event”	means, in respect of the NMSS: <ul style="list-style-type: none"> (a) a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or (b) a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or (c) a petition is presented for its winding up (which is not dismissed within 14 Working Days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or

	<p>(d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or</p> <p>(e) an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or</p> <p>(f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or</p> <p>(g) being a "small company" within the meaning of section 382(3) of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986;</p>
“Inspectorates”	means one, any or all of the inspectorates: Office for Standards in Education, Children’s Services and Skills (Ofsted), the Care Quality Commission (CQC) and the Local Government Ombudsman;
“Law”	any law, statute, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, right within the meaning of Section 4(1) EU Withdrawal Act 2018 as amended by EU (Withdrawal Agreement) Act 2020, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the NMSS is bound to comply;
“Learning Programme”	means a programme of education delivered by the NMSS under this Agreement;
“NMSS Personnel”	means all persons employed or engaged by the NMSS together with the NMSS’s servants, agents, consultants and Sub-Contractors (and all persons employed by any Sub-Contractor together with the Sub-Contractor’s servants, consultants, agents, NMSS’s and Sub-Contractors) used in the performance of its obligations under this Agreement;
“NMSS Regulations”	<p>Means the Non-Maintained Special School (England) Regulations 2015</p> <p>The Non-Maintained Special Schools (England) Regulations 2015 (legislation.gov.uk)</p> <p>Non-Maintained Special Schools Regulations 2015 - GOV.UK (www.gov.uk)</p>
“NMSS Related Party”	means any officer, agent, employee of the NMSS acting in the course of their office or employment including any Sub-Contractors supplied by the NMSS in relation to the Services;

“NMSS System”	the information and communications technology system used by the NMSS in performing the Services including the NMSS’s equipment and related cabling (but excluding the Department System);
“Occasion of Tax Non-Compliance”	<p>(a) any tax return of the NMSS submitted to a Relevant Tax Authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:</p> <p>(i) a Relevant Tax Authority successfully challenging the NMSS under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;</p> <p>(ii) the failure of an avoidance scheme which the NMSS was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or</p> <p>(b) any tax return of the NMSS submitted to a Relevant Tax Authority on or after 1 October 2012 gives rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Agreement Date or to a civil penalty for fraud or evasion;</p>
“Ofsted Monitoring Visit”	means an interim type of inspection carried out by Ofsted in accordance with the Further Education and Skills Inspection Handbook (Further education and skills inspection handbook - GOV.UK (www.gov.uk))
“Ofsted”	means the Office for Standards in Education, Children’s Services and Skills;
“Parties”	means the Department acting on behalf of the Crown and the NMSS;
“Personal Data Breach”	takes the meaning given in the GDPR;
“Personal Data”	takes the meaning given in the GDPR;
“Premises”	means the location(s) where the Services are to be performed;
“Prohibited Acts”	means the acts specified in Clause 34 (Prohibited Acts);

“Pupil”	means any person aged 18 or under to whom the NMSS is required to deliver any of the Services;
“Pupil Files” / “Pupil Records” / “Evidence Packs”	means any information relating to a Pupil generated by the NMSS, the Pupil or a third party for the purpose of the delivery of the Learning Programme;
“Regulated Qualification Framework” or “RQF”	a system for cataloguing all qualifications regulated by Ofqual;
“Regulatory Body”	means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate or investigate the matters dealt with in this Agreement or any other affairs of the NMSS or the Department, including, without limitation Ofsted, the European Commission and the European Court of Auditors;
“Relevant Authority”	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, officer or public or statutory person of the Government of the United Kingdom or of the European Union;
“School Census”	means the data collection framework set out at Complete the school census - Guidance - GOV.UK (www.gov.uk)
“Services Start Date”	means the date as set out in the Specification (Schedule 1);
“Services”	means the services to be provided in accordance with the Funding Rules and the Specification (Schedule 1);
“Significant Incident or Emergency”	an event or occurrence which: <ul style="list-style-type: none"> (i) constitutes an emergency for the purposes of the Civil Contingencies Act 2004; and/or (ii) constitutes an emergency under local and community risk registers; and/or (iii) is designated as a significant or emergency incident under the Incident Response Plan;
“Specification”	means the documents contained in Schedule 1 setting out the Department’s requirements for the Services to be provided under this Agreement;

<p>“Staffing Information”</p>	<p>in relation to all persons identified on the Supplier's Provisional Supplier Personnel List or Supplier's Final Supplier Personnel List, as the case may be, such information as the Department may reasonably request (subject to all applicable provisions of the DPA), but including in an anonymised format:</p> <ul style="list-style-type: none"> (a) their ages, dates of commencement of employment or engagement, gender and place of work; (b) details of whether they are employed, self employed contractors or consultants, agency workers or otherwise; (c) the identity of the employer or relevant contracting Party; (d) their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures, and redundancy payments; (e) their wages, salaries, bonuses and profit sharing arrangements as applicable; (f) details of other employment-related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schedules applicable to them; (g) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims); (h) details of any such individuals on long term sickness absence, parental leave, maternity leave or other authorised long term absence; (i) copies of all relevant documents and materials relating to such information, including copies of relevant Agreements of employment (or relevant standard Agreements if applied generally in respect of such employees); and (j) any other “employee liability information” as such term is defined in regulation 11 of the Employment Regulations;
<p>“Sub-Contract”</p>	<p>means an agreement entered into between the NMSS and a Sub-Contractor for the purposes of engaging the Sub-Contractor to deliver part of the Services on behalf of the NMSS;</p>
<p>“Sub-Contracting”</p>	<p>means any delivery to a Pupil’s programme of learning by a separate legal entity, irrespective of whether such learning is</p>

	provided by a third party recruited to deliver on site (travel to teach), online learning or whether it is described as a service.
“Sub-Contracting Threshold”	means 25% of the Pupils in each Funding Stream under this Agreement in any given Funding Year;
“Sub-Contractor”	means a separate legal entity or an individual (not an employee) that has an agreement (called a Sub-Contract) with the NMSS to deliver any element of the Services the Department funds. A separate legal entity includes but is not limited to companies in the NMSS’s group, other associated companies and sole traders. An individual could include a person who is a sole trader, self-employed, a freelancer or someone who is employed by an agency, unless those individuals are working under the NMSS’s direct management and control in the same way as the NMSS’s own employees. This does not include relationships between the NMSS and other third parties providing services such as marketing;
“Sub-Contractor Declaration”	the declaration that the Department requires a NMSS to complete specifying whether or not the NMSS is Sub-Contracting any of the Services and if so, what Services and the amount of funding that represents;
“Sub-Contractor Policies”	means the Department’s policies that apply to Sub-Contracting and Sub-Contractors as set out at: Post-16 education subcontracting: using funding to offer education and training - GOV.UK (www.gov.uk) ;
“Successor NMSS”	means the person nominated by the Department to undertake the services substantially the same as the Services after the termination of this Agreement;
“Termination Date”	means any date on which this Agreement terminates in accordance with Clause 36 (Termination);
“UK GDPR”	the General Data Protection Regulation (Regulation (EU) 2016/679) as transposed into United Kingdom national law by operation of section 3 of the European Union (Withdrawal) Act 2018, together with the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019;
“Voluntary Community and Social Enterprise” or “VCSE”	means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives;

“Working Day”	a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London.
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- 1.1 In this Agreement, unless the context otherwise requires, capitalised expressions shall have the meanings set out in Clause 1 above or the relevant Schedule in which that capitalised expression appears. If a capitalised expression does not have an interpretation in Clause 1 or the relevant Schedule, it shall have the meaning given to it in this Agreement.
- 1.2 In this Agreement except where the context otherwise requires:-
- 1.2.1 the masculine includes the feminine and vice-versa;
 - 1.2.2 the singular includes the plural and vice-versa;
 - 1.2.3 a reference to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;
 - 1.2.4 any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
 - 1.2.5 any reference to any enactment, order, regulation, code, guidance or other similar instrument shall be construed as a reference to the enactment, order, regulation, code, guidance or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
 - 1.2.6 references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
 - 1.2.7 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
 - 1.2.8 headings are for reference only;
 - 1.2.9 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words;
 - 1.2.10 the Schedules to this Agreement form part of this Agreement;
 - 1.2.11 references to the Parties shall be to the parties to this Agreement; and
 - 1.2.12 references to months shall mean calendar months.
- 1.3 No review, comment or approval by the Department under the provisions of this Agreement shall operate to exclude or limit the NMSS's obligations or liabilities under this Agreement or the Department's rights under this Agreement.
- 1.4 Precedence of Documentation
- In the event of any inconsistency between the provisions of the Terms and Conditions and the Schedules, or between any of the Schedules, the conflict shall be resolved according to the following descending order of priority:
- 1.4.1 the Terms and Conditions,
 - 1.4.2 Schedule 1 (Specification & Monitoring),

1.4.3 the remaining Schedules,

for the avoidance of doubt, in the event of any inconsistency between this Agreement, NMSS Regulations and the Funding Rules, the NMSS Regulations will take precedence.

- 1.5 In relation to any provision in the Agreement, the Secretary of State may act through the Department for Education and / or its executive agency, ESFA. As such where the Agreement refers to the Department, both the Department for Education and the ESFA are entitled to act in accordance with; and / or benefit from; and / or enforce the relevant provision.
- 1.6 Without prejudice to the provisions set out in Clause 1.5, the Department for Education will principally manage provider registers, the relationship with the NMSS and any intervention; and the ESFA will principally be responsible for allocations, payments, Agreement administration and assurance.

PART 2: THE SERVICES

2 COMMENCEMENT AND DURATION

- 2.1 The Agreement Period will commence on the Agreement Date and expire or terminate on the earlier of:
- 2.1.1 the Expiry Date; or
- 2.1.2 the Termination Date.

3 SERVICE DELIVERY

- 3.1 The Services to be delivered under this Agreement are those as set out in Schedule 1 (Specification & Monitoring). The detailed requirements in respect of the Services are also set out in the Funding Rules as amended from time to time by the Department and which form part of the terms and conditions of this Agreement.
- 3.2 The Services are to be delivered in accordance with the Specification, specific requirements of the Department, and all other Schedules, which all form part of the terms and conditions of the Agreement.
- 3.3 The NMSS will comply (and will ensure that any Sub-Contractor complies) with the Department Policies.
- 3.4 The NMSS will ensure that data relating to Pupils including Pupil records is held and saved in a format that can be reasonably accessed by the Department on request.
- 3.5 The NMSS will comply in all respects with all relevant Laws to which it may be subject.

4 EMERGENCIES AND SIGNIFICANT INCIDENTS

- 4.1 The NMSS must have and maintain an up-to-date Business Continuity Plan. [Expecting the unexpected - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/expecting-the-unexpected)

- 4.2 The NMSS must at the request of the Department provide whatever support and assistance may reasonably be required by the Department in response to any national, regional or local emergency or incident (including Significant Incident or Emergency) including at any premises identified by the Department.
- 4.3 The NMSS will ensure that Pupils have access to portfolios, e-portfolios, learning materials and other evidence at all times.

5 PERFORMANCE MONITORING

5.1 NMSS Monitoring

- 5.1.1 The NMSS must put in place the necessary internal control framework, including an internal audit function if appropriate to ensure that it meets its obligations and those of its Sub-Contractors under this Agreement.

5.2 Department Monitoring

- 5.2.1 The Department will undertake its own performance monitoring, as set out in Schedule 1 (Specification & Monitoring) and may elect, at its own cost, to undertake further monitoring at any stage during the Agreement Period for any purpose, including ensuring that the Services are being provided in accordance with this Agreement.
- 5.2.2 The NMSS must use its reasonable endeavours to assist the Department in any performance monitoring exercise under Clause 5.2.1. The Department may notify the NMSS of the outcome of the performance monitoring exercise and the NMSS must have due regard to the Department's comments in relation to the future provision of the Services.
- 5.2.3 Without prejudice to the Department's rights under Clauses 35 (Withholding, Suspension, and Repayment of Funding) and 36.2 (Termination) and to any other express rights under this Agreement, where the NMSS has been found to be fraudulent or have recklessly submitted erroneous reports, claims and/or Pupil data, or the Department reasonably believes such reports to be fraudulent or erroneous the Department may, by notice to the NMSS, increase the level of its monitoring of the NMSS or (at the Department's option) require the NMSS to increase the level of the NMSS's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Services which are the subject of such fraudulent, erroneous or misleading reporting until such time as the NMSS must have demonstrated to the reasonable satisfaction of the Department that it will perform (and is capable of performing) its obligations under this Agreement and, in which case, the following provisions will apply:
 - (a) any such notice to the NMSS will specify in reasonable detail the additional measures to be taken by the Department or by the NMSS (as the case may be) in monitoring the performance of the NMSS;
 - (b) if the NMSS (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it will notify the Department in writing within five (5) Working Days of the receipt of

the notice of the measures objected to (and of any Changes necessary in order to prevent prejudice to the NMSS's performance of its obligations under this Agreement);

- (c) the measures to be taken by the Department and the NMSS (as the case may be) will be agreed between the Parties or, in the absence of agreement within ten (10) Working Days of the Department's receipt of the NMSS's objection, determined pursuant to the Dispute Resolution Procedure; and
- (d) the NMSS will bear its own costs and indemnify and keep the Department indemnified at all times from and against all costs and expenses reasonably and properly incurred by or on behalf of the Department in relation to such increased level of monitoring.

5.3 NMSS Responsible

5.3.1 The NMSS acknowledges and agrees that, notwithstanding any provision of this Agreement which contemplates that the Department will or may from time to time:

- (a) monitor or inspect any performance of the Services;
- (b) check compliance by the NMSS with its obligations; or
- (c) confirm or indicate approval of or non-objection to proposals made by the NMSS,

it will always be fully the responsibility of the NMSS, and not the responsibility of the Department, to ensure that the Services are performed in all respects in accordance with the NMSS's obligations under this Agreement and no such action by or on behalf of the Department will in any way limit or affect such obligations.

5.4 Quality Management Systems

5.4.1 The Department will have the right upon reasonable notice and at reasonable times to audit the NMSS's quality management systems (for example ISO 9000 or equivalent standard) and/or any other quality management system to which the Specification refers, including examining and inspecting services and activities on or off the premises owned or occupied by the NMSS to establish the adequacy or accuracy of the quality management system documentation. The NMSS will use all reasonable endeavours to assist the Department in such exercise.

6 CHANGES

6.1 The Department may implement a Change to the Services during the Agreement Period.

6.2 The Department may implement a Change by communicating the change through the Department's publications, Update or Inform, or through updates to Funding Rules and other related documents on GOV.UK. The NMSS will subscribe to alerts from GOV.UK so they are made aware of Changes.

7 HEALTH & SAFETY

- 7.1 The NMSS must comply with all health and safety legislation and Health and Safety Executive working regulations, adopt and maintain safe operating systems of work and appropriate safety policies in order to protect the health and safety of NMSS Personnel, Pupils and all other persons including members of the public.
- 7.2 Where part of the Services are provided in an environment outside the direct control of the NMSS, the NMSS must take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Pupils. This will include but not be limited to, co-ordinating and co-operating with other organisations/bodies with responsibilities being clearly identified and documented as appropriate, to ensure understanding between the relevant parties.
- 7.3 The NMSS must report all incidents that are reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (“RIDDOR”) in accordance with those regulations and must investigate or assess the circumstances of all Pupil incidents within the scope of RIDDOR and follow HSE guidance ‘Investigating accidents and incidents: A workbook for employers, unions, safety representatives and safety professionals’ (HSG245) ISBN 0717628272. The NMSS must only use persons competent to investigate/assess Pupil incidents with a view to identifying the causes of any incident and lessons to be learned.
- 7.4 The NMSS must inform the Department of the death of any Pupil during the provision of the Services. This will be done by informing the Department’s representative by telephone or email immediately upon the NMSS becoming aware of the death.
- 7.5 The NMSS will, in circumstances where it Sub-Contracts the management and/or delivery of the Services under this Agreement, ensure that all the provisions in respect of health and safety in this Clause 7 are included in the Sub-Contract with each Sub-Contractor.

8 PUPIL WELFARE

- 8.1 In addition to its statutory health and safety responsibilities as referred to in Clause 7 (Health and Safety) above, the NMSS must ensure that the Services are delivered in safe, healthy and supportive environments, which meet the needs of Pupils in accordance with this Clause 8 and Clause 24 (Employees).
- 8.2 Where the NMSS provides residential accommodation for Pupils, the NMSS must inform the Department of the provision of such residential accommodation, must record this information on Get Information about Schools and must comply with the requirements of the Residential Special Schools: National Minimum Standards published from time to time by the Secretary of State under section 87C of the Children Act 1989.
- 8.3 In providing the Services, the NMSS must ensure it actively promotes the fundamental British values of democracy, the rule of Law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs, and promote principles that support equality of opportunity for all.

- 8.4 Where, by virtue of being a ‘children’s home’ within the meaning of the Care Standards Act 2000, the person carrying on or managing the NMSS is required to be registered with Ofsted, the NMSS must comply with the Children’s Homes (England) Regulations 2015 (or such successor secondary legislation as may replace those Regulations) in respect of the NMSS.
- 8.5 In providing the Services, the NMSS must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and must have regard to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act 2015 ([Prevent duty guidance: for further education institutions in England and Wales - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales)).
- 8.6 In providing the Services, the NMSS must comply with the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty).
- 8.7 The NMSS will monitor, and act on, any other harm to Pupils to the extent that the NMSS could reasonably be expected to do so and/or where the harm could affect the quality of the learning experience. Harm includes (but is not limited to) incidents that cause absence from learning, any loss to the Pupil of any physical or mental faculty or any disfigurement and incidents of bullying and harassment.
- 8.8 NOT USED
- 8.9 The NMSS and/or the NMSS Related Parties must be able to demonstrate that they have robust record-keeping procedures in respect of health, safety and safeguarding through checks on record keeping undertaken.
- 8.10 The NMSS will ensure it notifies the Department via the Contact Form: General Enquiries at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/education-and-skills-funding-agency) where a referral has been made by the NMSS or one of the NMSS Related Parties in either of the following circumstances (such notification must include the name of the institution, a high level summary of the nature of the incident (without sharing personal information about victims or alleged perpetrators) and confirmation of whether it is, or is scheduled to be, investigated by the Local Authority and/or the police):
- 8.10.1 a safeguarding concern related to sexual violence to Local Authority children’s social care/adult social care and/or the police, or
 - 8.10.2 an allegation of abuse made against a teacher, lecturer or other member of staff to the designated officer(s) (at the local authority).
- 8.11 The NMSS will ensure it notifies the Department via the Contact Form: General Enquiries at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/education-and-skills-funding-agency) of incident(s) and/or where a referral has been made, where the NMSS or one of the NMSS Related Parties:
- 8.11.1 is aware of an incident, or pattern of incidents, which undermines the promotion of British fundamental values as referred to in Clause 8.3 or the ability of the NMSS or the NMSS Related Parties to comply with the Prevent duty, or
 - 8.11.2 makes a referral of an individual member of NMSS Personnel for the purposes of determining whether that member of NMSS Personnel

should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism.

8.12 Where it applies:

8.12.1 The NMSS must comply with the Modern Slavery Act 2015 and must have in place throughout the Agreement Period policies and procedures to ensure full compliance.

8.12.2 The NMSS must ensure that all Sub-Contracts that it enters into include an obligation for the Sub-Contractor to comply with the Modern Slavery Act 2015 with special emphasis on express anti-slavery and anti-human trafficking provisions.

8.12.3 The NMSS shall implement due diligence procedures to ensure that there is no slavery or human trafficking in any part of its supply chain.

8.13 The NMSS will, in circumstances where it Sub-Contracts the management and/or delivery of the Services under this Agreement, ensure that all the provisions in respect of Pupil welfare in this Clause 8 are included in the Sub-Contract with each Sub-Contractor.

9 EQUALITY OF OPPORTUNITY

9.1 The NMSS must not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 or any statutory modification or re-enactment thereof or any other statutory provision relating to discrimination in employment or the provision of services. The NMSS must take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the NMSS and all Sub-Contractors employed in the execution of the Agreement. The NMSS will comply with the detailed requirements in relation to equality of opportunity set out in Clauses 9.2 to 9.4.

9.2 The NMSS will, in delivering the Services under this Agreement, demonstrate that it has had regard to the duties placed on the Department and the NMSS by the Equality Act 2010. The NMSS will take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the NMSS and all Sub-Contractors engaged in the delivery of the Services.

9.3 The NMSS must ensure that equality of opportunity is built into all aspects of Services; the business planning process; and the self-assessment process. The NMSS must use analysis of data to inform future planning to improve the representation, participation and success of underrepresented and underachieving groups and challenge stereotyping. The NMSS must use appropriate, specific and measurable objectives. These will be proportionate, relevant and aligned to the Services the NMSS is funded to deliver.

9.4 The Department may use a variety of equality information and data to support judgements about quality and eligibility for funding. These may include, but are not limited to: inspection judgements for equality and diversity, judgements from the Equality and Human Rights Commission, and the success and participation rates of different groups of Pupils.

10 QUALITY ASSURANCE AND RAISING STANDARDS

- 10.1 The NMSS warrants and undertakes to the Department that it and any NMSS Related Party has and will continue to have the resources and skills necessary to carry out the NMSS's obligations pursuant to this Agreement.
- 10.2 The NMSS must comply with the Funding Rules published by the Department as amended from time to time and any other requirements, which may from time to time be issued by the Department, Inspectorates, the Awarding Organisations and other Regulatory Bodies and of which the NMSS is made aware.
- 10.3 The NMSS must ensure that all activities carried out pursuant to this Agreement will be documented in accordance with any requirements of the Department and must provide such documentation as the Department may request from time to time to ensure compliance with this Clause 10.3.
- 10.4 The NMSS will continuously seek to improve the Services and raise standards to benefit the Pupil. The NMSS will have the primary responsibility for improving standards and will need to demonstrate to the Department's satisfaction that it has an effective quality assurance system based on the implementation of its own quality improvement process. The Department reserves the right to require the NMSS to provide the Department or Ofsted with evidence to support the quality improvement processes.
- 10.5 The NMSS must use all reasonable endeavours to:
- 10.5.1 where appropriate minimise dropout rates and deliver high completion and achievement rates and appropriate progression;
 - 10.5.2 offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
 - 10.5.3 provide good management and leadership of the learning process;
 - 10.5.4 deliver value for money and financial probity; and
 - 10.5.5 ensure all Sub-Contractors delivering Services under the Agreement on behalf of the NMSS comply with the requirements set out in Clauses 10.5.1 to 10.5.4 above.
- 10.6 Failure to meet the requirements set out in Clauses 10.5.1 to 10.5.5 may result in the Department assessing the NMSS to be in breach of the Agreement.
- 10.7 Where appropriate, the NMSS must confirm in writing to the Department that their (including NMSS Related Parties) Centre Approval Status for the relevant Services is still current. The written statement will need to confirm approved centre status for the specific Regulated Qualification Framework ("RQF") titles and levels, including Awarding Organisation name(s).
- 10.8 The NMSS must notify the Department immediately in writing via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk) if it receives any sanction from an Awarding Organisation, including but not limited to the suspension and/or removal of Centre Approval Status and/or the removal of the ability to register or certificate Pupils.
- 10.9 The Department can request any Awarding Organisation reports, assessments and notices from the NMSS at any time.

10.10 The Department may assess the quality and delivery of the Services and the NMSS's compliance with the requirements in Clauses 10.5.1 to 10.5.5 during the Agreement Period. The NMSS will be informed of the outcome of that process. Where the Department assesses the NMSS to be in breach of agreement following such assessment the Department will issue a notice which, where the Department is not terminating the Agreement, may:

10.10.1 require the NMSS to meet improvement indicators to improve the quality of its Services. The Department will meet with the NMSS to discuss and reach agreement on implementation of these actions and improvement indicators and to agree arrangements for monitoring and reviewing progress. In such cases reviews will take place at the frequency specified by the Department and in agreement with the NMSS;

10.10.2 agree detailed improvement plans and measures that set out clearly the expected timescale for improvement;

10.10.3 agree arrangements for more frequent monitoring of quality improvement plans.

11 FINANCIAL HEALTH

11.1 The Department will undertake an assessment of the NMSS's financial health and control ([ESFA financial health assessment - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672227/ESFA_financial_health_assessment_-_GOV.UK.pdf)). Should the Department, at its absolute discretion, consider that the outcome of any financial health and/or control assessment is inadequate the Department may, in its absolute discretion take one or more of the following actions:

11.1.1 require the NMSS to, and the NMSS will, accept and comply with additional conditions of funding relating to the improvement of financial health and/or control arrangements;

11.1.2 require the NMSS to suspend the enrolment of Pupils to the Services and/or cap any growth in Pupil numbers;

11.1.3 give consideration to what changes, if any, are required in its allocations when finalising the amount of funding in any subsequent agreement between the parties; and/or

11.1.4 terminate the Agreement in accordance with Clause 36.3.2.

11.2 Where the NMSS fails to comply with requirements imposed under Clauses 11.1.1 and/or 11.1.2 the Department will consider termination of the Agreement under Clause 36.3.2.

11.3 Failure to submit accounts for assessment when requested will automatically deem the assessment under Clause 11.1 as 'inadequate' and Clauses 11.1.1 to 11.1.4 will apply.

11.4 Where the outcome of a financial assessment illustrates a deterioration from the previous assessment the Department may in its absolute discretion (and without prejudice to its rights under Clause 11.2) request such further assurance or information from the NMSS as it deems necessary.

11.5 The NMSS must notify the Department immediately if it, or any NMSS Related Party, is experiencing or forecasting any financial difficulties and the Department

may ask for additional financial information to obtain assurance of continuity of delivery of the Services.

- 11.6 The Department may require the NMSS to procure an independent business review of the NMSS's financial health at the NMSS's cost (or the Department may procure such a review and recharge the costs to the NMSS, at its sole discretion) if the Department has concerns over the financial health of the NMSS.
- 11.7 The Department can at any time require the NMSS at its own cost to provide a copy of the NMSS's latest accounts, any historic accounts as requested, and submit further copies of the accounts as soon as they become available and to provide, upon request:
 - 11.7.1 the NMSS's up to date management accounts, including financial performance against delivery;
 - 11.7.2 financial forecasts of the NMSS's financial position for the next 12 months;
 - 11.7.3 cash flow forecasts for the next 12 months;
 - 11.7.4 any additional financial information the Department deems necessary.
- 11.8 Where the further information required from the NMSS under Clauses 11.4, 11.5, 11.6 and 11.7 does not provide adequate assurance to the Department then the Department may in its absolute discretion take one or more of the actions set out in Clauses 11.1.1 to 11.1.4.
- 11.9 The Department reserves the right to request that the NMSS provide a guarantee or other form of security on terms that will be notified to the NMSS.

12 INSPECTIONS

- 12.1 When the NMSS receives notification from an Inspectorate that the Services are to be inspected, the NMSS will, on request, provide the Department with details of its quality improvement activity, and any other relevant information in accordance with the required timescale of the Inspectorate. The NMSS must promptly notify the Department via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](http://www.gov.uk) of the date of the meeting at which an Inspectorate gives feedback on the inspection. The NMSS must confirm to the Department in writing the outcome of the inspection within 5 Working days of receiving the feedback from the Inspectorate.
- 12.2 Ofsted may, at any time during the Agreement Period, or on the instruction of the Department, undertake an inspection of the NMSS. The Department will consider the outcome of any such inspection in the manner set out in Clauses 12.3 to 12.8.

Inadequate in part

- 12.3 Where Ofsted has published its assessment that the Services to be inadequate in any graded sub-judgement, including residential provision, the Department may, in its absolute discretion take one or more of the following actions:
 - 12.3.1 require the NMSS to accept and comply with additional conditions of funding relating to the improvement of the Services assessed as inadequate; and/or

- 12.3.2 require the NMSS to suspend the enrolment of Pupils to, and/or to cap any growth in, the Services which is assessed as inadequate; and/or
- 12.3.3 give consideration to the Services which are assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent agreements between the Parties; and/or
- 12.3.4 reduce, suspend or recover payment to the NMSS in respect of that part of the Services assessed as inadequate in accordance with the provisions of this Agreement; and/or
- 12.3.5 terminate the Agreement in accordance with Clause 36.3.5 (Termination).

Inadequate overall

- 12.4 Where the Department is made aware that Ofsted has provisionally assessed the Services to be inadequate overall, the Department may, in its absolute discretion commence discussions with the NMSS and other relevant co-funding Regulatory Bodies where appropriate as part of considering what actions as specified in Clauses 12.5.1 to 12.5.5 inclusive may be taken.
- 12.5 Where Ofsted has published its assessment that the Services are inadequate overall, the Department may, in its absolute discretion take one or more of the following actions:
 - 12.5.1 require the NMSS to accept and comply with additional conditions of funding relating to the improvement of the overall Services; and/or
 - 12.5.2 require the NMSS to suspend the enrolment of Pupils to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or
 - 12.5.3 give consideration to the Services which are assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent agreements between the Parties; and/or
 - 12.5.4 reduce, suspend or recover payment to the NMSS in accordance with the provisions of this Agreement; and/or
 - 12.5.5 terminate this Agreement in accordance with Clause 36.3.5 (Termination).
- 12.6 The failure of the NMSS, as assessed by the Department, to comply with any requirements of Clauses 12.5.1 to 12.5.2 inclusive within such time as the Department may deem reasonable may lead to the Department taking such actions as it deems appropriate which may include, but is not limited to, terminating the Agreement in accordance with Clause 36.3.4 (Termination).
- 12.7 The Department will take action based on the Inspectorate's published outcomes as in Clause 12.5 above. Where the Department is made aware that the NMSS has made a complaint about the graded outcome of the overall assessment by Ofsted, the Department will continue to progress action under Clauses 12.4 to 12.5 but will be mindful of the implications arising from the outcome of a complaint. The Department will review any decisions made at such time as outcomes of any complaint are made known.

- 12.8 If an Inspectorate rating is given based on incorrect or fraudulent information or data from the NMSS this will constitute a breach of agreement and the Department may, at its sole discretion, terminate the Agreement.
- 12.9 The NMSS must permit access at any reasonable time to any representative of any of the Inspectorates in order to undertake an inspection of the residential accommodation provided to Pupils. The NMSS must ensure that such representatives are able to examine, or take copies of any documentation, accounts, books and records relevant to the provision of the residential accommodation to the Pupils and to conduct interviews with relevant Pupils in relation to the accommodation provided to them during these visits at any reasonable time.

Ofsted Monitoring Visits

- 12.10 Where Ofsted has published its assessment that the NMSS is making “insufficient progress” on any of the Monitoring Visit inspection themes, the Department may, in its absolute discretion take the following actions:
- 12.10.1 require the NMSS to, and the NMSS shall, accept and comply with additional conditions of funding relating to the improvement of the Services within agreed timescales. Such conditions will include complying with the published recommendations of Ofsted. These conditions will apply until a full Ofsted inspection or further Ofsted Monitoring Visit of the NMSS has taken place; and/or
- 12.10.2 require the NMSS to temporarily suspend the enrolment of Pupils; and/or
- 12.10.3 NOT USED
- 12.10.4 require the NMSS to inform all of their existing main providers about the outcome of the Ofsted visit; and/or
- 12.10.5 terminate this Agreement in accordance with Clause 36.3.6 (Termination) where Pupils may be at immediate risk on the grounds of safeguarding issues and/or the quality of leadership and/or learning provision is such that one or more Pupil has no reasonable prospect of achieving their learning objective; and/or
- 12.10.6 terminate this Agreement in accordance with Clause 36.3.7 (Termination) if the NMSS has two (2) consecutive Ofsted Monitoring Visits each resulting in one or more “insufficient progress” judgements in relation to one or more themes.

13 NOT USED

14 FRAUD AND IRREGULARITY

- 14.1 The NMSS must notify the Department immediately where it becomes aware of any instance of suspected fraud or financial irregularity in the delivery of the Agreement including, but not limited to, cases of:
- 14.1.1 collusion with members of staff of the Department or employees of the Department for Education;
- 14.1.2 computer fraud;

14.1.3 the submission to the Department of inaccurate, incomplete, misleading or falsified information for the purpose of a claim for funding;

14.1.4 fraud involving Awarding Organisations;

14.1.5 fraud involving Sub-Contractors;

provided that nothing in this Clause 14 (Fraud and Irregularity) will require the NMSS to do anything, which may cause it to infringe any Law.

14.2 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Agreement and payments made hereunder, the Department and/or its agents will have:

14.2.1 right of access to the NMSS's Premises (or that of any of its Sub-Contractors) at any reasonable time with or without notice to examine and remove or copy all relevant documents and records including electronic records;

14.2.2 the right to require the NMSS to provide written authority to enable the Department to obtain such documents, records and/or information directly from third parties; and

14.2.3 the right to interview the NMSS's servants or agents engaged with the delivery of the Agreement.

Failure to comply with this Clause 14.2 will constitute a breach of this Agreement.

14.3 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Agreement and payments made hereunder, the Department may require the NMSS to procure the services of an independent accountant (or other equivalent/appropriate professional) to investigate at the NMSS's cost (or the Department will procure such an independent accountant and recharge the costs to the NMSS at its sole discretion).

14.4 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to:

14.4.1 the delivery of this Agreement; or

14.4.2 the delivery of any other Agreement between the Department and the NMSS; or

14.4.3 the payments made under this Agreement or any other agreement between the Department and the NMSS;

the Department will have the right to suspend payments and/or require the NMSS to suspend enrolment of Pupils under this Agreement and any other agreement between the Parties.

14.5 Where the NMSS is a registered or exempt charity, the NMSS will inform the Department of any schemes, orders or official warnings issued to them by the Charity Commission. Failure to inform the Department will constitute a breach of this Agreement.

PART 3: AGREEMENT GOVERNANCE

15 RELATIONSHIPS

15.1 Information and Assistance

15.1.1 Subject to any obligation in respect of confidentiality, the Data Protection Legislation and Confidential Information, the Parties will use all reasonable endeavours to provide and share information and data reasonably required by the other:

- (a) to enable it to perform its obligations under this Agreement; and/or
- (b) (In the case of the NMSS) which is reasonably necessary to enable the Department to perform its statutory obligations and other functions insofar as they relate to the Services.

15.1.2 Neither Party will hinder, delay or prevent the other Party in the performance of the other Party's obligations under this Agreement.

15.2 Enquiries, Investigations and Inspections

15.2.1 The NMSS must and will ensure that its Sub-Contractors will at all times during the Agreement Period and for a period of six (6) years thereafter, or such other time period as stated in the Schedule 1 (Specification & Monitoring), at its own cost, fully co-operate with any enquiry, investigation or inspection (whether routine or specific) which in any way concerns, affects or relates to the Services, or any sum claimed or charged in relation to this Agreement or to any other Agreement of the Department. Such enquiry, investigation or inspection may be by, inter alia:-

- (a) the Department;
- (b) the Department's auditors (whether internal or external);
- (c) Regulatory Bodies; and/or
- (d) the Inspectorates.

15.2.2 Such co-operation will include (but not be limited to) the following:-

- (a) providing access to or copies of such files, documents, letters, emails, notes, minutes, records, accounts or any other information (whether held or stored electronically, in hard copy format or otherwise) which relate to the subject or Service (in whole or in part) under investigation;
- (b) providing access to the premises, equipment (including IT hardware and software) or other assets used by the NMSS and/or its Sub-Contractors in the performance of this Agreement, such access to be supervised at all times unless the nature of the investigation requires the parties defined at Clause 15.2.1 to be unsupervised, such parties acting reasonably in making such assessment;
- (c) providing access to NMSS Personnel (of whatever seniority) involved in this Agreement (including managerial or supervisory

staff) or who may be the subject of, or be named in, any enquiry or investigation by the auditors or the ombudsmen (including providing suitable facilities for interviewing such staff);

- (d) maintaining the confidentiality of the enquiry or investigation when requested to do so;
- (e) making such explanations (whether written or oral) as may be necessary for the enquiry or investigation to be satisfied that the terms and conditions of this Agreement, the Funding Rules and the Law are being complied with;
- (f) at all times and without notice allowing access by the Inspectorates, in connection with any complaint, investigation or inspection relating to this Agreement or the Services to the NMSS's premises; and to all documentation and information relating to this Agreement to which the NMSS has (and/or is required under this Agreement to have) access; and to the NMSS's agents, employees and Sub-Contractors.

15.2.3 Where the Department has undertaken an investigation or received a report from an independent accountant or otherwise, in relation to the NMSS it may, as a consequence of that investigation or report, require the NMSS to, and the NMSS will, accept and comply with additional conditions of funding and will meet the cost of such investigation.

15.2.4 Where the NMSS fails to comply with the additional conditions imposed under Clause 15.2.3, within such time as the Department deems reasonable, the Department may take such actions as it deems appropriate which may include, but is not limited to, terminating the Agreement in accordance with Clause 36 (Termination).

15.2.5 The NMSS will in performing the Services comply fully with all relevant rules and regulations of the Department in force from time to time.

15.2.6 The NMSS will, if requested by the Department, co-operate with the Department, at its own expense, in connection with any legal proceedings, adjudication, arbitration, court proceedings or ombudsmen enquiries in which the Department may become involved, arising from breaches of the Department's duties under the Equalities Legislation due to the alleged acts or omissions of the NMSS, its employees, Sub-Contractors or agents.

15.2.7 The NMSS will ensure that the terms of any Sub-Contract include identical provisions to this Clause 15 and will indemnify the Department against any losses, damages or claims it suffers in consequence of a failure to ensure the inclusion of such identical provisions.

15.3 Complaints and Feedback

15.3.1 The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Services will rest with the NMSS.

15.3.2 The NMSS must ensure that all the requirements set out at paragraph 31 of the NMSS Regulations are met.

- 15.3.3 Where a complaint has not been resolved to the satisfaction of the complainant the NMSS will advise the complainant of their right to complain to the Department ([Complaints procedure - Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](#)) and co-operate with any investigation carried out by the Department and act on any recommendations made by the Department following the investigation.

16 REPRESENTATIVE

16.1 Agreement Manager

- 16.1.1 Without limiting the Department's obligations or rights in respect of such matters the Department will appoint an Agreement Manager who may subject to Clause 16.1.2 exercise the rights and powers conferred by this Agreement upon the Department.
- 16.1.2 Except pursuant to Clause 45 (Amendments to this Agreement), or unless specifically authorised for that purpose, the Agreement Manager does not have authority to amend the Agreement or to relieve the NMSS of any express obligations under the Agreement.

16.2 Account Manager

- 16.2.1 The NMSS will notify the Department in writing of the name, telephone number, e-mail address and the postal address of the person appointed as the Account Manager.
- 16.2.2 The Account Manager may exercise the functions, rights and powers conferred by this Agreement upon the NMSS.
- 16.2.3 In the event that the NMSS wishes to change the identity of the Account Manager, it will, subject to Clause 16.2.4 give to the Department not less than 5 Working Days' notice in writing of such change. Such written notice will inform the Department of the name, telephone number e-mail address and postal address of the new Account Manager.
- 16.2.4 In the event that it is not possible or practical for any reason for the NMSS to give notice to the Department in accordance with Clause 16.2.3 the NMSS will notify the Department by whatever means the NMSS considers appropriate and will confirm such notification in writing within 5 Working Days.

16.3 User Role Management System

- 16.3.1 The NMSS must ensure that those senior members of staff who are authorised to agree and sign Agreements on behalf of the NMSS, submit Funding claims and return data are registered as users of the user role management system at [Skills Funding Agency: Login \(fasst.org.uk\)](#). It is the NMSS's responsibility to maintain appropriate user roles on an on-going basis.

17 DISPUTE RESOLUTION

- 17.1.1 Any dispute will be dealt with in accordance with this Clause 17.

- 17.1.2 In the first instance, a representative of each Party will each use their reasonable endeavours to resolve the dispute. If the dispute cannot be resolved by such representatives within 15 days of the dispute arising, it will be referred to a senior representative of each Party, who will each use their reasonable endeavours to resolve the dispute.
- 17.1.3 If a dispute cannot be resolved by negotiation as referred to in Clause 17.1.2 within 30 days of the dispute arising, either Party may refer the dispute for determination in accordance with the mediation procedure administered by the Centre for Effective Dispute Resolution, the costs of the mediator being split equally between the Parties, who will otherwise bear their own costs.
- 17.1.4 For the avoidance of doubt, the Department shall not be obliged to follow the Dispute Resolution Procedure in circumstances where it wishes to terminate this Agreement in any circumstances described in Clause 36 (Termination).

PART 4: IPR DATA AND CONFIDENTIALITY

18 NOT USED

19 NOT USED

20 DATA PROTECTION AND PROTECTION OF PERSONAL DATA

- 20.1 The NMSS should meet the data protections and data sharing requirements set out in the School Census [Statutory requirement, data sharing and regulations - Complete the school census - Guidance - GOV.UK \(www.gov.uk\)](#), and should give due consideration to the Data protection: toolkit for schools [Data protection: toolkit for schools - GOV.UK \(www.gov.uk\)](#).

21 SUBMISSION OF PUPIL DATA

21.1 General

- 21.1.1 The NMSS must supply the Department with data in accordance with the following:
- (a) in line with agreed audit arrangements;
 - (b) in adherence with Data Protection Legislation;
 - (c) to support payments to be made;
 - (d) to enable reconciliation to take place;
 - (e) to support the Agreement management and allocation processes;
and
 - (f) any written request from the Department.
- 21.1.2 The NMSS undertakes to the Department to submit accurate data.

- 21.1.3 Where the Department is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the NMSS, the Department may require the NMSS to supply data more frequently for such a period as the Department will require and the Department may audit, or instruct a third party to audit, at the NMSS's cost, the NMSS's data and controls to gain assurance that the quality improvements have been made.
- 21.1.4 The Department reserves the right to require the NMSS, at its own cost, to carry out such work as the Department deems necessary to improve the quality of data.
- 21.1.5 The Department reserves the right to suspend payments to the NMSS under the Agreement where data quality gives rise to concern about the accuracy of the data provided by the NMSS.
- 21.1.6 NOT USED
- 21.1.7 NOT USED
- 21.1.8 The NMSS must register with UKRLP ([UK Register of Learning Providers \(ukrlp.co.uk\)](http://ukrlp.co.uk)) and Get Information About Schools ([Get Information about Schools - GOV.UK \(get-information-schools.service.gov.uk\)](http://get-information-schools.service.gov.uk)) and maintain contact details on an on-going basis.
- 21.1.9 The NMSS must publish online the set of information as set out at [What academies, free schools and colleges must or should publish online - GOV.UK \(www.gov.uk\)](http://www.gov.uk).
- 21.1.10 The NMSS must submit data about any member of its NMSS Personnel in the format and to the timescales as required by the Department.
- 21.1.11 Failure to transmit complete and accurate data to the Department in accordance with this Clause 21 will constitute a breach of agreement in accordance with Clause 35 (Withholding, Suspension, and Repayment of Funding) of this Agreement.

21.2 School Census Submission

- 21.2.1 The NMSS must supply data on each individual Pupil in accordance with the data collection framework set out in the School Census [Complete the school census - Guidance - GOV.UK \(www.gov.uk\)](http://www.gov.uk) as amended and updated.
- 21.2.2 The NMSS shall transmit data for each part of the Services (as defined in the Appendices to the School Census [Complete the school census - Guidance - GOV.UK \(www.gov.uk\)](http://www.gov.uk)).
- 21.2.3 Data collected must be transmitted through COLLECT [DfE Sign-in \(education.gov.uk\)](http://education.gov.uk) the Department's centralised data collection and management system. COLLECT is restricted and the NMSS confirms it has agreed to comply with conditions of use regarding the supply of data to COLLECT.
- 21.2.4 At times the Department will need to share information with the NMSS. The Department will where applicable do this securely via COLLECT. By

accessing and using this system the NMSS agrees to the terms and conditions detailed at the site governing how it accesses and use the portal. The NMSS will need to ensure that it has the right hardware, operating system and browser.

22 NOT USED

23 FREEDOM OF INFORMATION AND CONFIDENTIALITY

23.1 Freedom of Information

- 23.1.1 The Department and NMSS acknowledge that both the Department and NMSS are subject to legal duties under the FOIA and the EIR, which may require them to disclose on request information relating to this Agreement or otherwise relating to themselves.
- 23.1.2 The Department and NMSS acknowledge and agree that both are required by Law to consider each and every request made under the FOIA and/or the EIR for information.
- 23.1.3 The Department and NMSS acknowledge and agree that all decisions made by the other pursuant to a request under the FOIA and/or the EIR are solely a matter for and are at the discretion of the Department or the NMSS respectively.
- 23.1.4 Notwithstanding anything in this Agreement to the contrary (including without limitation any obligations of confidentiality), the Department and NMSS will be entitled to disclose information in whatever form pursuant to a request made under the FOIA and/or the EIR, save that in relation to any information that is Exempt Information the Department and/or NMSS will use reasonable endeavours (but will not be obliged) to consult the other and will not:
- (a) confirm or deny that information is held by them; or
 - (b) disclose information requested to the extent that in the Department or NMSS's opinion the information is eligible in the circumstances for an exemption and therefore the Department or NMSS may lawfully refrain from disclosing such information.
- 23.1.5 In relation to information relating to the Department or NMSS or the Agreement which the Department or NMSS requests should be exempt under the FOIA and/or the EIR the Department or NMSS will indemnify the other for any and all costs (including legal fees) incurred by the other in:
- (a) assessing the application of any exemption under the FOIA and/or the EIR; and/or
 - (b) responding to any FOIA Notice; and/or
 - (c) lodging any appeal against a decision of the Information Commissioner in relation to disclosure where such costs are incurred pursuant to efforts by the Department or NMSS to withhold Exempt Information.

- 23.1.6 Neither the Department nor the NMSS will on any account be liable for any loss, damage, harm or detriment, howsoever caused, arising from or in connection with the disclosure under the FOIA and/or the EIR of any Exempt Information or other information whether relating to this Agreement or otherwise relating to the Department or NMSS.
- 23.1.7 The Department and NMSS will assist each other as reasonably necessary to enable the Department and NMSS to comply with its obligations under the FOIA and/or the EIR.

23.2 Confidentiality

- 23.2.1 The NMSS hereby warrants and undertakes that:
- (a) any person employed or engaged by it (in connection with this Agreement in the course of such employment or engagement) will treat all Confidential Information belonging to the Department as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Agreement; and
 - (b) any person employed or engaged by it (in connection with this Agreement in the course of such employment or engagement) will not disclose any Confidential Information to any third party without prior written consent of the Department, except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 23.2.2 The NMSS must take all necessary precautions to ensure that all Confidential Information obtained from the Department is treated as confidential and not disclosed (without prior written approval from the Department's Agreement Manager) or used other than for the purposes of this Agreement by any of its employees, servants, agents or Sub-Contractors.
- 23.2.3 The provisions of Clauses 23.2.1 and 23.2.2 will not apply to any information:
- (a) which is or becomes public knowledge (other than by breach of Clauses 23.2.1 and 23.2.2 or any other duty of confidentiality);
 - (b) which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
 - (c) which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the FOIA or the EIR.
- 23.2.4 Nothing in this Clause 23.2.4 will be deemed or construed to prevent the Department from disclosing any Confidential Information obtained from the NMSS:
- (a) to any other Central Government Body, Non-Departmental or Quasi Government Body or agency, central or local;
 - (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;

- (c) to any professional adviser, consultant, contractor or other person engaged by the Department directly in connection with this Agreement, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
 - (d) on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Agreement.
- 23.2.5 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the course of the Services, the NMSS undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice.
- 23.2.6 The NMSS will immediately notify the Department of any breach of security in relation to Confidential Information and all data obtained in the course of the Services and will keep a record of such breaches. The NMSS will use its best endeavours to recover such Confidential Information or data however it may be recorded. The NMSS will co-operate with the Department in any investigation that the Department considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.
- 23.2.7 The NMSS must, at its own expense, alter any security systems at any time during the Agreement Period at the Department's request if the Department reasonably believes the NMSS has failed to comply with Clause 23.2.6.
- 23.2.8 The Department reserves the right to publish details of this Agreement and the payments made under it to comply with the Government's transparency requirements.
- 23.2.9 The provisions of this Clause 23 will apply for the Agreement Period and after its termination.

PART 5: WORKFORCE

24 EMPLOYEES

- 24.1 When employing or engaging a person to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulation 2012), in respect of any Pupils under the age of 19 and High Needs Learners aged 19 to 25 (as if those High Needs Learners were Pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), the NMSS must comply with Part 3 (Safer Recruitment) of [Keeping children safe in education - GOV.UK \(www.gov.uk\)](http://www.gov.uk/government/publications/keeping-children-safe-in-education).
- 24.2 The NMSS will comply with Part 2 (The Management of Safeguarding) and Part 3 (Safer Recruitment) of [Keeping children safe in education - GOV.UK \(www.gov.uk\)](http://www.gov.uk/government/publications/keeping-children-safe-in-education) in order to ensure the Services are provided with a view to safeguarding and promoting the welfare of Children whether at the institution or

in an environment outside the direct control but under the auspices of the NMSS. This must include the adoption of safer recruitment procedures. In doing so, the NMSS will have regard to any guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within NMSS. References to 'must' in any such guidance will be treated as 'should' for the purposes of this Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service

24.3 The NMSS will comply with Part 2 (The Management of Safeguarding) of [Keeping children safe in education - GOV.UK \(www.gov.uk\)](http://www.gov.uk) in order to ensure the Services are delivered with a view to safeguarding and promoting the welfare of High Needs Learners aged up to 25 receiving education or training at their institution or under the auspices of the NMSS in an environment outside the direct control of the NMSS. This must include the adoption of safer recruitment procedures, as set out in Part 3 (Safer Recruitment) of [Keeping children safe in education - GOV.UK \(www.gov.uk\)](http://www.gov.uk). In doing so, the NMSS will make those arrangements as if such High Needs Learners were Children and the NMSS will have regard to any guidance published, from time to time, by the Secretary of State for Education, which sets out the expectations in relation to safeguarding practice within further education institutions as if it applied to those High Needs Learners as if they were Children. References to 'must' in any such guidance will be treated as 'should' for the purposes of this Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service.

24.4 The NMSS must ensure it takes the following action in respect of all NMSS Personnel and potential NMSS Personnel who in connection with the NMSS's provision of the Services will or is likely to be in contact with Pupils or who will have access to Pupils information (other than Department Employees):

24.4.1 they are questioned as to whether they have any Convictions or ASBOs or any other punishment for antisocial behaviour order (such as a civil injunction, community protection notice or criminal behaviour order);

24.4.2 the results are obtained of a background check with the DBS of the most extensive kind permitted by Law;

24.4.3 to the extent permitted by Law, a copy of the results of such a background check as is referred to in Clause 24.4.2 are provided to the Department on request;

24.4.4 in respect of potential NMSS Personnel from overseas the NMSS must comply with the following guidance [Criminal records checks for overseas applicants - GOV.UK \(www.gov.uk\)](http://www.gov.uk),

the NMSS must take the above action before the relevant NMSS Personnel or potential NMSS Personnel commences any activities in relation to the Services.

24.5 The NMSS must also ensure that:

24.5.1 no person who appears on a Barred List following the results of a DBS background check will be employed or engaged in the performance of the Services; and

- 24.5.2 it and all its Sub-Contractors will comply with all reporting requirements to the DBS including those who will have access to Pupils' information (other than the Department's employees).
- 24.6 In so far as permitted by Law, where the NMSS has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the NMSS under the Safeguarding Vulnerable Groups Act 2006, the NMSS will ensure that it informs the Department via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk) that a referral has been made/information has been provided.
- 24.7 In the event that any NMSS Personnel or any employee of any Sub-Contractor is added to a Barred List, the NMSS must ensure that such member of staff will cease to be engaged in the Provision or any activities connected with the Provision.
- 24.8 The NMSS will require NMSS Personnel, including those handling Pupil information, to declare annually whether there has been a change in their circumstances relating to the background checks referred to in this Clause 24. Where the self-declaration indicates a change in circumstances relating to those background checks, the NMSS will:
- 24.8.1 assess the risk of continuing to engage such member of NMSS Personnel in the delivery of the Provision;
 - 24.8.2 request new background checks of such member of NMSS Personnel as required by this Clause 24;
 - 24.8.3 without prejudice to Clause 24.9, put in place appropriate actions to ensure Pupils are safeguarded, including, but not limited to, extra supervision of the member of NMSS Personnel, re-assignment to an area of the delivery of the Services that does not bring the member of NMSS Personnel into regular contact with Pupils, and/or Pupil information or removal from the delivery of the Services of the member of NMSS Personnel, until such time as the NMSS has received the outcome of the background checks required under Clause 24.8.2 and has taken any action required as a result of the outcome of such background checks.
- 24.9 Pending the receipt by the NMSS of the results of the background checks referred to in this Clause 24, NMSS Personnel will not be used in the provision of the Services.
- 24.10 Failure by the NMSS to comply with Clauses 24.4 to 24.9 will constitute a material breach of this Agreement.
- 24.11 The NMSS will provide details of its policies and procedures for recruitment, training, development, supervision and other employment-related policies when requested to do so.
- 24.12 The NMSS will ensure that it has in place and complies with an effective whistleblowing procedure, approved by the body responsible for the management of the NMSS, whereby staff may raise in confidence concerns about possible malpractice without fear of victimisation, subsequent discrimination or disadvantage. The procedure must be published on the NMSS's public-facing website. The NMSS will regularly review the procedure,

including securing approval from the body responsible for the management of the NMSS of any amended procedure.

- 24.13 Unless NMSS Personnel transfer to the Department and/or a Successor Provider under TUPE at expiry or termination of the Agreement, the NMSS will retain employment records (or retain the right to access employment records) for seven (7) years following the last day such NMSS Personnel were engaged in providing Services save for NMSS Personnel in contact with Children and/or with access to information about Children where such records will be retained for fifteen (15) years following such date.
- 24.14 When requested by the Department on reasonable grounds, the NMSS will cease to use any NMSS Personnel specified by the Department in the provision of the Services. For the purposes of this Clause 24.14 NMSS Personnel will include all members of the board, including those who are not employees.
- 24.15 The NMSS must ensure that:
- 24.15.1 there will be at all times a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. This obligation will include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and
 - 24.15.2 all NMSS Personnel receive such training and supervision as is necessary to ensure the proper performance of the Services under this Agreement.
- 24.16 The NMSS must inform the Department if directors, or any other person who has powers of representation, decision or control, meet the characteristics set out in the Funding higher-risk organisations and Sub-Contractor document. [Department for Education policy on funding higher risk organisations and subcontractors - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/policies/department-for-education-policy-on-funding-higher-risk-organisations-and-subcontractors). Failure to inform the Department will be a material breach of the Agreement.
- 24.17 Where the Agreement value is greater than £10,000,000, the NMSS will consider the use of apprenticeships in the delivery of the Services.
- 24.18 The NMSS must ensure that it and any Sub-Contractors have in place and maintain personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The NMSS must ensure that the terms and implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form. The NMSS must provide copies of such policies to the Department, on the Department's request.

25 NOT USED

PART 6: PAYMENT, FUNDING AND AUDIT

26 PAYMENT AND AUDIT

26.1 Payment, Funding and Audit provisions

- 26.1.1 In consideration of the Services to be provided by the NMSS, the Department agrees to pay the NMSS the amounts set out in Schedule 2 of this Agreement on condition that the NMSS delivers the Services in accordance with the terms and conditions of this Agreement.
- 26.1.2 The NMSS must use the Funding solely for the purpose of delivering the Services as set out in this Agreement.
- 26.1.3 The NMSS will comply with the Funding Rules published by the Department as amended from time to time.
- 26.1.4 The Department reserves the right to impose additional conditions of funding where it considers it is necessary to do so to secure the delivery of education and training of a reasonable quality by the NMSS, or to ensure that the resources provided by the Department are being used effectively and efficiently or to require the NMSS to address concerns about its financial viability.
- 26.1.5 The payment of Funding by the Department will be without prejudice to any claims or rights, which the Department may have against the NMSS and will not constitute any admission by the Department as to the performance by the NMSS of its obligations under this Agreement. Prior to any such payment of Funding, the Department will be entitled to make deductions or deferrals in respect of any disputes or claims whatsoever with or against the NMSS, arising from this Agreement or any other agreement between the NMSS and the Department.
- 26.1.6 The Department shall be entitled to terminate, pursuant to Clause 36.3.9 this Agreement on written notice if the NMSS does not enrol and/or data returns reveal that no Pupils have been enrolled for the academic year to which this Agreement relates. Where the Department terminates the Agreement under this Clause 26.1.6, the Department will withdraw the allocation of Funding for the academic year and will take action to recover Funds where payments have already occurred.
- 26.1.7 Where the Department identifies errors which it deems material in the data that the NMSS is required to provide under the Agreement to support the payment of Funding, the Department reserves the right at its absolute discretion to require the NMSS at the NMSS's cost to procure an independent 100% audit of all or part of the Services by a deadline specified by the Department and / or require the NMSS to repay Funding equivalent to the full amount of the Funding that has been wrongly claimed or paid. If only a sample of the Services has been audited, the Department reserves the right to calculate an error rate based on the said sample and claim repayment from the NMSS of an extrapolated amount based on the error rate identified and the total value of the Funding paid to the NMSS under this Agreement.

- 26.1.8 Without prejudice to any other provisions in this Agreement, at the Department's discretion, such amounts as are identified as being recoverable under Clause 26.1.7, may be recovered by making adjustments to data submitted by the NMSS under the Agreement, or by raising an invoice for payment by the NMSS, or by making deductions from future payments due to the NMSS under the Agreement. Failure to settle such amounts by the NMSS will constitute a breach of this Agreement. The decision of the Department as to the amount of recovery under this Clause 26.1 (Payment, Funding and Audit provisions) is final.
- 26.1.9 Where the Department, in accordance with Clause 26.1.7, identifies errors it may at its discretion review the NMSS's controls and processes to gain assurance the errors will not occur again. Where further assurance work is required this will be at the NMSS's cost (or the Department will procure and recharge to the NMSS at its sole discretion). Where a full funding audit results in a "qualified" rating this will constitute a breach of this Agreement.
- 26.1.10 The Department may implement a reduction in Funding as set out in the Funding Rules through a notification and not a variation pursuant to Clause 45 (Amendments to this Agreement).
- 26.1.11 Where the Department identifies that the allocated Funding has been miscalculated and that the NMSS has been overpaid as a result, the Department will notify the NMSS in writing of the amount of the overpayment, the date when the Department will seek to recover the Funding and the method of recovery such as being through an invoice or through setting off the overpayment against future payments of the Funding.
- 26.1.12 If the NMSS wants to make representations in relation to the notification it received in accordance with Clause 26.1.11, the NMSS must put them in writing within 5 Working Days of the date the notification received from the Department. The NMSS may make representations to the Department where it has incurred in good faith costs or liability in excess of the amount of allocated Funding that the Department has now notified as being the correct amount of Funding that the NMSS should have been allocated.
- 26.1.13 The Department will consider any representations made by the NMSS in accordance with Clause 26.1.12 and issue the NMSS with written notification of its final decision including the amount of overpayment of Funding to be repaid, the date when the Department will recover the Funding and the method of recovery. The Department will also set out the basis on which it has made its decision and shall include an amended Schedule 2 setting out the corrected Funding allocation.
- 26.1.14 The decision of the Department as to the amount of recovery of Funding that it is due to it from the NMSS is final.
- 26.1.15 All payments by the Department will be made via BACS.

Tax Compliance

26.1.16 The Department may ask the NMSS to provide information which demonstrates how the NMSS complies with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax in respect of that consideration.

26.1.17 The Department may terminate this Agreement if:

- (a) in the case of a request mentioned in Clause 26.1.16 the NMSS:
 - (i) fails to provide information in response to the request within a reasonable time; or
 - (ii) provides information which does not demonstrate either how the NMSS complies with Clauses 26.1.16 and 26.1.19 or why those clauses do not apply to it;
 - (iii) it receives information which demonstrates that is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax.

26.1.18 The Department may supply any information which it receives under Clause 26.1.16 to HMRC.

26.1.19 If, during the Agreement Period, an Occasion of Tax Non-Compliance occurs, the NMSS will:

- (a) notify the Department in writing of such fact within 5 Working Days of its occurrence; and
- (b) promptly give the Department:
 - (i) details of the steps it is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors it considers relevant; and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Department may reasonably require.

27 REVIEW OF CONTRACTUAL PERFORMANCE AND RECONCILIATION OF AGREEMENTS

27.1 In-Year Reconciliation

27.1.1 Reviews of contractual performance and reconciliation will be carried out in accordance with part 1B of Schedule 1 (Specification and Monitoring).

27.1.2 The evidence required in respect of each Learning Programme is set out in the Funding Rules and the NMSS must retain such evidence for inspection on demand.

27.2 Performance

27.2.1 Performance will be monitored in accordance with the provisions of part 1B of Schedule 1 (Specification and Monitoring).

27.2.2 The Department will be able to share allocations and performance information with Combined Authorities, Crown Bodies, and Local Authorities.

28 NMSS'S RECORDS AND AUDIT

28.1 Maintenance of Records

28.1.1 The NMSS must, and will procure that any NMSS Related Parties, maintain a full record of all incidents relating to data protection, health, safety and security, including CCTV, which occur during the Agreement Period. The NMSS will make the aforementioned records available for inspection by the Department upon reasonable notice, and will present a report of them to the Department as and when requested.

28.2 Auditor

28.2.1 The Department (in accordance with [Post-16 audit code of practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672222/Post-16_audit_code_of_practice_-_GOV.UK_(www.gov.uk).pdf)), the European Commission, the European Court of Auditors and/or a Crown Body may at any time conduct (whether itself or by its agents, consultants or advisers) audits for the following purposes:-

- (a) to establish that the NMSS has used the Funding (and proposed or actual variations to the Funding in accordance with this Agreement) in the delivery of the Services and/or the costs of all suppliers (including Sub-Contractors) of the Services;
- (b) to verify the NMSS's claims for Funding;
- (c) to review the integrity, confidentiality and security of the Department Data as well as the Department's access to the Department Data;
- (d) to review the NMSS's and/or a NMSS Related Party's (compliance with the DPA 2018, the FOIA and EIR in accordance with Clause 23 (Freedom of Information and Confidentiality) and any other Law applicable to the Services;
- (e) to carry out the audit and certification of the Department's accounts;
- (f) to verify the accuracy and completeness of any management information delivered or required by this Agreement;
- (g) to ensure that the NMSS and/or a NMSS Related Party is complying with the Department Policies and any British or equivalent European standards and any other audit that may be required by any Relevant Authority,

such audits may be based on current or preceding years or preceding Agreements.

28.2.2 The Department will use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the NMSS or delay the provision of the Services.

- 28.2.3 Subject to the Department's obligations of confidentiality, the NMSS and/or a NMSS Related Party must on demand provide the Department (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:-
- (a) all information requested by the Department within the permitted scope of the audit;
 - (b) reasonable access to any premises and any equipment used (whether exclusively or non-exclusively) in the performance of the Services;
 - (c) access to the NMSS's and/or a NMSS Related Party's systems;
 - (d) access to NMSS Personnel; and
 - (e) provision of any accounting records as referred to in Section 386 of the Companies Act 2006 and/or financial records as the Department may require which if the NMSS is not a company may include similar accounting records as are referred to in Section 386 of the Companies Act 2006.
- 28.2.4 The NMSS will implement all measurement and monitoring tools and procedures necessary to measure and report on the NMSS's (including for the avoidance of doubt a NMSS Related Party's) performance of the Services.
- 28.2.5 The Department will endeavour to (but is not obliged to) provide at least ten (10) Working Days' notice of its intention to conduct an audit. The Department may carry out audit visits with or without prior notice at its discretion.
- 28.2.6 The Parties agree that they will bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, unless the audit identifies a material breach or malpractice by the NMSS and/or a NMSS Related Party in which case the NMSS will reimburse the Department for all the Department's reasonable costs incurred in the course of the audit.
- 28.2.7 NOT USED
- 28.2.8 If the Department identifies that:-
- (a) the NMSS has failed to perform its obligations under this Agreement in any material manner, without prejudice to any other remedy that the Department has, the Parties will agree and the NMSS will implement and comply with a remedial plan. If the NMSS's failure relates to a failure to provide any information to the Department about the Funding, proposed Funding or the NMSS's costs, then the remedial plan will include a requirement for the provision by the NMSS of all such information;
 - (b) there has been any under or over payment it will be dealt with in accordance with Clause 26.1 (Payment, Funding and Audit provisions).

28.2.9 The NMSS must permit records referred to in this Clause 28 to be examined and copied from time to time by the Department's auditor and inspectors and their representatives and other representatives of the Department.

28.3 Retention

28.3.1 The records referred to in this Clause 28 will be retained for a period of at least six (6) years, after the end of the Agreement Period subject to any requirements for a longer retention period set out in the Funding Rules.

28.4 Information on Termination or Expiry

28.4.1 Upon termination or expiry of this Agreement the NMSS must (and will ensure that the Sub-Contractors will) comply with all reasonable requests of the Department to provide information relating to the NMSS's costs of providing the Services.

28.5 Confidentiality of Information

28.5.1 All information referred to in this Clause 28 is subject to the obligations set out in Clause 23.2 (Confidentiality) and Clause 23.1 (Freedom of Information).

28.5.2 For the purposes of the examination and certification of the Department's accounts and/or any examination of the economy, efficiency and effectiveness with which the Department has used its resources, the National Audit Office and/or the Department's internal or external auditor may examine such documents premises, systems and staff as they may reasonably require which are owned, held or otherwise within the control or employ of the NMSS or Sub-Contractors (who must ensure that any person acting on its behalf who has such documents and/or other information will also provide access) and may require the NMSS to produce such oral or written explanation as they considers necessary.

28.5.3 Where the Department appoints an independent third party to undertake, exercise or carry out any of the rights or powers contained in this Clause 28 (NMSS's Records and Audit), the Department must ensure that, simultaneously with its appointment, such independent third party enters into a confidentiality agreement with the Department that requires the independent third party to comply with confidentiality provisions equivalent to those set out in this Agreement.

29 NOT USED

PART 7: CORPORATE GENERAL

30 SUB-CONTRACTING

30.1 The NMSS may enter into Sub-Contracts provided it does so in compliance with Schedule 1 (Specification and Monitoring) and Schedule 9 (Sub-Contracting).

- 30.2 Notwithstanding any arrangements the NMSS has entered into with any Sub-Contractor, the NMSS shall not be relieved or excused of responsibility or liability under this Agreement nor shall performance of its obligations be affected by the appointment of any Sub-Contractor.
- 30.3 If the NMSS does not Sub-Contract any of the Services, the NMSS must still provide a nil return via the Sub-Contractor Declaration to confirm this.
- 30.4 Failure to comply with any of the requirements under Clauses 30.1 to 30.3 may result in the Department taking such actions as it deems appropriate, which may include, but is not limited to, action under Clause 35 (Withholding, Suspension and Repayment of Funding) and / or termination under Clause 36 (Termination).

31 INDEMNITIES AND LIABILITY

31.1 NMSS Indemnity

31.1.1 The NMSS will be responsible for, and will release and indemnify the Department, its employees and agents on demand from and against all liability from:

- (a) death or personal injury caused by its negligence or that of its employees, agents or Sub-Contractors (as applicable);
- (b) breach of statutory duty;
- (c) third party actions, claims or demands brought against the Department as a direct consequence of the NMSS's breach of this Agreement;
- (d) fraud or fraudulent misrepresentation by it, its employees, agents or Sub-Contractors (as applicable);
- (e) loss of or damage to property;
to the extent which the same may arise out of, or in consequence of:
- (f) the performance or non-performance by the NMSS of its obligations under this Agreement; and
- (g) In all other respects, any negligent act, default or breach of statutory duty in connection with the performance or non-performance by the NMSS of its obligations under this Agreement or of any NMSS Personnel in the performance or non-performance of the Services.

31.2 NMSS Not Responsible

31.2.1 The NMSS will not be responsible for or obliged to indemnify the Department for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Department or by the breach by the Department of its obligations under this Agreement.

31.3 Limitation of Indemnity

31.3.1 Subject to Clause 31.9 an indemnity by either Party under any provision of this Agreement will be without limitation to any indemnity by that Party under any other provision of this Agreement.

31.4 Responsibility for Related Parties

31.4.1 The NMSS will be responsible as against the Department for the acts or omissions of the NMSS Related Parties as if they were the acts or omissions of the NMSS and the Department will be responsible as against the NMSS for the acts or omissions of Department Related Parties as if they were the acts or omissions of the Department.

31.5 Notification of Claims

31.5.1 Where either Party (the “Indemnified Party”) wishes to make a claim under this Clause 31 against the other (the “Indemnifying Party”) in relation to a claim made against it by a third party (a “Third Party Claim”), the Indemnified Party will give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

31.6 Conduct of Claims

31.6.1 The Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the Third Party Claim including its settlement and the Indemnified Party will not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period (and the Indemnified Party has notified the Indemnifying Party in writing that it is of the opinion that such reasonable period has expired), take any action to settle or pursue the Third Party Claim.

31.7 Costs of Claims

31.7.1 The Indemnifying Party may, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

31.7.2 The NMSS’s liability to the Department pursuant to this Clause 31 will be, for the avoidance of doubt, without prejudice to any other right or remedy available to the Department under this Agreement.

31.8 No Limit on Liability

31.8.1 Neither Party excludes or limits its liability to the other Party for:

- (a) death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors (as applicable); or
- (b) any breach of any obligations implied by Section 12 of the Sale of Goods Act 1979 or Section 2 of the Supply of Goods and Services Act 1982; or
- (c) fraud by it, fraud by its employees, fraud by its agents or Sub-Contractors (as applicable); or
- (d) NOT USED
- (e) any breach of the DPA 2018.

31.9 NMSS Limit on Liability

31.9.1 Subject to Clause 31.2 (NMSS Not Responsible) Clause 31.8 (No Limit on Liability) and Clause 31.12 (Indirect Loss), the liability of the NMSS for the Agreement Period will be Ten Million Pounds (£10,000,000) in aggregate in respect of all claims, losses or damages, whether arising under any indemnity from tort (including negligence), breach of agreement or otherwise under or in connection with this Agreement.

31.10 NMSS Aggregate Liability

31.10.1 If the aggregate liability of the NMSS under Clause 31.9 (NMSS Limit on Liability) is equalled or exceeded at any time during the Agreement Period, it will entitle the Department at its discretion to terminate this Agreement pursuant to Clause 36.3.12.

31.11 Department Limit on Liability

31.11.1 Subject to Clause 31.8 (No Limit on Liability) and Clause 31.12 (Indirect Loss), the liability of the Department for the Agreement Period will be limited to its obligation to pay the Funding as and when it falls due in accordance with this Agreement.

31.12 Indirect Loss

31.12.1 Neither Party will be liable to the other Party for any Indirect Losses or indirect damage.

31.13 Additional Clauses

31.13.1 The Parties expressly agree that if any limitation or provision contained or expressly referred to in this Clause 31 is held to be invalid under any Law, it will be deemed omitted to that extent, and if either Party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this Clause 31.

31.13.2 Nothing in this Clause 31 will act to reduce or affect a Party's general duty to mitigate its loss and for the avoidance of doubt including any circumstances under which a Party has the benefit of an indemnity under this Agreement.

31.14 No Double Recovery

31.14.1 Neither the Department nor the NMSS will be entitled to recover compensation or make a claim under this Agreement in respect of any loss that it or they has or have incurred to the extent that the Party has already been compensated in respect of that loss pursuant to this Agreement or otherwise.

32 INSURANCE

32.1 Requirement to Maintain

32.1.1 Without prejudice to its liability to indemnify the Department under Clause 31 (Indemnities and Liability) the NMSS must take out and maintain in force or procure the taking out and maintenance of the

Required Insurances and any other insurances as may be required by Law. The insurances will be effective in each case no later than the date on which the relevant risk commences.

32.1.2 The Required Insurances referred to in Clause 32.1.1 will amount to:

- (a) ten million pounds (£10 million) in respect of public liability cover in respect of each and every occurrence;
- (b) ten million pounds (£10 million) in respect of employer's liability cover in respect of each and every occurrence; and
- (c) five million pounds (£5 million) in respect of professional indemnity cover in respect of each and every claim.

32.1.3 The Department reserves the right, at any time, to request evidence that the Required Insurances are in force.

33 CHANGE IN CONTROL

33.1 The NMSS represents and warrants to the Department that at the Agreement Date the legal and beneficial ownership of the NMSS is as set out in any register information supplied by the NMSS and that no arrangements are in place that have or may result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the NMSS.

33.2 The NMSS will inform the Department in writing if there is a change in its name at least one month prior to the change taking effect unless to do would put the NMSS in breach of the Law. If that is the case the NMSS will inform the Department of the change in name within 10 Working Days of it becoming lawful to do so.

33.3 The NMSS will inform the Department as soon as reasonably practicable and, in any event 12 weeks before any Change in Control of the NMSS takes effect unless to do would put the NMSS in breach of the Law. If that is the case the NMSS will inform the Department of the Change in Control within 10 Working Days of it becoming lawful to do so.

33.4 NOT USED

33.5 The Department may, at any time, request that the NMSS informs them of details of any Change in Control and the NMSS will comply with such a request as soon as reasonably practicable and in any event within twenty (20) Working Days of receipt of the Department's request.

33.6 The Department will consider any Change in Control in the context of all available information including that provided by the NMSS. The Department will consider the criteria set out in the Funding higher-risk organisations and Sub-Contractors document which is published on the Department's website [Department for Education policy on funding higher risk organisations and subcontractors - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/policies/department-for-education-policy-on-funding-higher-risk-organisations-and-subcontractors).

33.7 If the Change in Control or change in name breaches this Agreement or any policies referred to in this Agreement, without prejudice to its other rights under this Agreement or otherwise, the Department reserves the right to take action

against the NMSS in accordance with Part 8 of this Agreement (Termination and Exit Management).

33.8 If there is a Restricted Share Transfer of the NMSS:

33.8.1 the NMSS will give the Department notice of such Restricted Share Transfer at the earliest possible time that it is lawful for the NMSS to do so; and

33.8.2 the Department reserves the right to take whatever actions it deems necessary;

34 PROHIBITED ACTS

34.1 The NMSS will not offer or give, or agree to give, to any member, employee or representative of the Secretary of State for Education any gift or consideration of any kind as an inducement or reward for doing or refraining from doing, or for having done or refrained from doing, any act in relation to the obtaining or execution of this Agreement or any other Agreement with the Department or for showing or refraining from showing favour or disfavour to any person in relation to this Agreement or any such Agreement.

34.2 The NMSS's attention is drawn to the criminal offences created by the Bribery Act 2010. Any offence by the NMSS or its employees or by anyone acting on its behalf under the Bribery Act 2010 in relation to this Agreement or any Agreement with the Department or His Majesty's Government will entitle the Department to terminate the Agreement and recover from the NMSS the amount of any loss resulting from such termination and/or to recover from the NMSS the amount of value of any gift, consideration or commission.

34.3 The NMSS must not use any Funding provided by the Department under this Agreement for any of the purposes set out in paragraphs 16 of the Cabinet Office: Guidance for General Grants [Grants-Standard-SIX-Grant-Agreements.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/grants-standard-six-grant-agreements.pdf) regardless of whether the Funding consists of a general grant or any other type of grant. For the avoidance of doubt, the NMSS's costs of memberships for their Associations are deemed eligible under the terms of the Agreement.

34.4 The NMSS will not hold itself out as acting on behalf of the Department.

PART 8: TERMINATION AND EXIT MANAGEMENT

35 WITHHOLDING, SUSPENSION AND REPAYMENT OF FUNDING

35.1 Without prejudice to the Department's other rights and remedies under this Agreement or otherwise, the Department may at its discretion withhold or suspend payment of Funding if one or more of the following applies:

35.1.1 the NMSS materially breaches any of the terms or conditions of this Agreement;

35.1.2 the Department, acting reasonably, has concerns:

- 35.1.2.1 about the standard of Services that the NMSS is delivering or has delivered including in respect of one or more standard or framework; and / or
 - 35.1.2.2 that the quality of leadership at the NMSS is such that one or more Pupil has no reasonable prospect of achieving their training objective; and / or
 - 35.1.2.3 that Pupils may be at risk on safeguarding grounds;
 - 35.1.3 an Awarding Organisation is taking remedial and / or enforcement action against the NMSS;
 - 35.1.4 the Department has reasonable grounds to suspect fraud, financial irregularity, dishonesty, negligence or practice by any of the NMSS and / or one or more NMSS Related Party;
 - 35.1.5 the Department has concerns about the completeness, accuracy or promptness of the data submitted by the NMSS on the School Census in relation to this Agreement or, subject to Clause 35.4 any other agreement;
 - 35.1.6 any employee of the NMSS or any other NMSS Related Party has acted or failed to act in a way which, as a result, in the reasonable opinion of the Department, brings or is likely to bring the Department's name, brand or reputation or the Apprenticeships brand into disrepute;
 - 35.1.7 the NMSS was not entitled to Funding under the Funding Rules in relation to one or more Pupil;
 - 35.1.8 there occurs, in respect of the NMSS, any Insolvency Event or Change in Control which, in the reasonable opinion of the Department, may affect the NMSS's ability to comply with its obligations under this Agreement; and/or
 - 35.1.9 the NMSS fails to comply with any of the provisions set out in this Agreement (including the provisions in the Funding Rules) and fails to rectify any such failure within 30 days of receiving written notice from the Department (or such other timescale specified in the notice) detailing the failure and requiring it to rectify the failure
 - 35.1.10 the Department is entitled to withhold or suspend payment of Funding under any other provisions in this Agreement.
- 35.2 Without prejudice to or limiting the provisions of Clause 35.1.1, where more than one breach (which are not material breaches) have occurred, those breaches (taken together) may be regarded as a material breach.
- 35.3 Rights to withhold, suspend and/or require repayment of the Funding are set out in other provisions in this Agreement and in the Funding Rules (as amended from time to time).
- 35.4 If under Clause 35.1.5 some or all of the Department's concerns about the completeness, accuracy or promptness of data relate to data submitted under an agreement other than this Agreement, then such concerns are relevant to the extent that they undermine the Department's confidence in the NMSS's ability to

comply with its obligations to submit complete or accurate or prompt data in relation to this Agreement.

35.5 The right to suspend Funding in accordance with Clause 35.1 includes the right to:

35.5.1 suspend the payment of Funding to the NMSS in relation to current Pupils for a specified period; and/or

35.5.2 not consider any applications or pay any Funding for new Pupils for a specified period.

35.6 Where the Department suspends Funding in accordance with the terms of this Agreement, it shall notify the NMSS in writing of the suspension and its duration as well as the intervals at which the suspension will be reviewed for the Department to determine whether the suspension should be withdrawn or extended.

36 TERMINATION

Termination by either Party

36.1 Either Party may terminate this Agreement in whole or in part by giving to the other Party not less than three months' written notice.

36.2 Either Party may terminate this Agreement with immediate effect by serving written notice if:

36.2.1 the other Party commits a material breach of any of its obligations under this Agreement, which is incapable of remedy; or

36.2.2 the other Party commits a material breach of its obligations under this Agreement which is capable of remedy and fails to remedy it or persists in such breach after 30 days of having been required in writing to remedy or desist.

Termination by the Department

36.3 The Department may terminate this Agreement with immediate effect by serving written notice in the following circumstances:

36.3.1 the Department withdraws approval from the NMSS; or an order by a justice of the peace has come into effect under the NMSS Regulations that the NMSS shall cease to be approved and no appeal to the First-tier Tribunal is pending;

36.3.2 the outcome of any financial health and/or control assessment undertaken in relation to the NMSS is inadequate;

36.3.3 the NMSS fails to comply with requirements imposed under Clauses 10.10.1 and/or 10.10.2 (Quality Assurance and Raising Standards);

36.3.4 if the NMSS fails to comply with requirements imposed under Clauses 12.3 (Inadequate in Part) or 12.5 (Inadequate Overall); and/or in accordance with any of the rights set out in Clauses 12.3.5 (Inadequate in Part), 12.5.5 (Inadequate Overall) or 15.2.4 (Enquiries, Investigations and Inspections);

- 36.3.5 if an inspection results in the Services in part or overall thereof being assessed as inadequate;
 - 36.3.6 in accordance with Clause 12.10.5 (Ofsted Monitoring Visits);
 - 36.3.7 in accordance with Clause 12.10.6 (Ofsted Monitoring Visits);
 - 36.3.8 the NMSS receives a “qualified” rating in two consecutive full funding audits; and/or
 - 36.3.9 in accordance with Clause 26.1.6, the NMSS does not enrol and/or data returns reveal that no Pupils have been enrolled for the academic year to which this Agreement relates;
 - 36.3.10 in any of the circumstances set out in Clause 26.1.17 (Payment Funding and Audit Provisions) and/or the Department receives information which demonstrates that the NMSS is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax;
 - 36.3.11 the NMSS commits a material breach of Clause 30 (Sub-Contracting);
 - 36.3.12 as set out in Clause 31.10 (NMSS Aggregate Liability);
 - 36.3.13 the NMSS commits one or more Prohibited Acts;
 - 36.3.14 where any of the circumstances set out in Clause 35 (Withholding, Suspension and Repayment of Funding) occurs;
 - 36.3.15 the NMSS repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give full effect to the terms of this Agreement;
 - 36.3.16 an Insolvency Event affecting the NMSS occurs; and/or
 - 36.3.17 if the Department terminates another agreement with the NMSS on fault grounds similar to the Department's termination rights set out in this Agreement.
- 36.4 This Agreement will be voidable where, following an evaluation of the last three (3) years' Data Submissions relating to any other Agreement with the Department, the Department concludes that the NMSS was in material breach of that Agreement or Agreements and if the Department had known at the time of awarding and/or entering into this Agreement that the NMSS had committed a material breach, it would not have awarded and/or entered into this Agreement.
- 36.5 If the circumstances set out in Clause 36.4 arise and the Agreement is declared void, the parties will be deemed to have subsequently entered into a new legally binding agreement that includes the provisions set out in the table at Clause 53.1.2.
- 36.6 Where the NMSS goes into administration or liquidation, the Department must be assumed to be a creditor of the NMSS. The NMSS must take steps to ensure that the Department is provided with details of the administrator or liquidator and receives notification of any creditors meetings. The Department will confirm whether in fact it is a creditor within 12 weeks of being notified that the NMSS is in administration or liquidation.

37 CONSEQUENCES OF TERMINATION AND EXPIRY

- 37.1 The NMSS must not enrol new Pupils, including Pupils that have transferred from another NMSS, after notice of termination of the Agreement has been given. The Department will not be liable to make payments in respect of any Pupils enrolled in breach of this clause.
- 37.2 The Department reserves the right to retain Funding that would otherwise be paid to the NMSS prior to the Expiry Date or Termination Date and/or to demand repayment of Funding, as relevant, in order to reconcile what has already been paid to the NMSS under Schedule 2 (Payments) with the amount the NMSS is entitled to under this Agreement (including the Funding Rules).
- 37.3 On or before the Expiry Date (except where the NMSS will be responsible for delivering the Services in the subsequent Funding Year) or Termination Date, the NMSS must (at its own cost) ensure that all Pupil files, documents and computer records in its and a Sub-Contractor's possession, custody or control (including but not limited to e-portfolios) which contain information relating to the Services are transferred to the Department upon request.
- 37.4 For the avoidance of doubt, after notice of termination and/or an Insolvency Event affecting the NMSS, the NMSS must not share any information about Pupils, including but not limited to Department Data, with another Organisation unless the Department provides written authorisation for the NMSS to do so. In addition, the NMSS shall not enrol Pupils from another provider that has been issued with a notice of termination and/or in relation to whom an Insolvency Event has occurred, without the permission of the Department.
- 37.5 The NMSS hereby grants the Department a non-exclusive licence to access the NMSS's Premises from the date of a notice of termination for such periods as may be reasonably necessary to enable the Department to retrieve the information referred to in Clause 37.3. The Department will exercise the rights provided under this clause where the NMSS has failed to comply with Clause 37.3 and the obligations set out in Schedule 8 (Exit Arrangements).
- 37.6 The termination or expiry of this Agreement shall be without prejudice to rights of either Party accrued prior to the Termination Date or Expiry Date and shall not affect the continuing rights of the Parties under any provision of the Agreement that either expressly or by implication has effect after the Termination Date or the Expiry Date.
- 37.7 For the avoidance of doubt, the termination of this Agreement howsoever arising shall not entitle the NMSS to any compensation.
- 37.8 Where this Agreement is terminated or expires, the Department may elect to take the role of Data Controller to secure and protect Pupil Files, Pupil Records and/or Evidence Packs, including e-portfolios until the Pupil information can be transferred to a new NMSS, the Pupil, or destroyed in accordance with defined retention periods. If the Department elects to assume this role, the NMSS shall co-operate fully to facilitate this.

38 EXIT ARRANGEMENTS

- 38.1 The Department and the NMSS must, unless the NMSS will be responsible for delivering the Services in the following Funding Year, comply with their respective obligations in relation to the exit arrangements set out in Schedule 8 (Exit Arrangements) and any current Exit Plan.
- 38.2 On expiry or termination of this Agreement for any reason, the NMSS shall do its utmost to minimise any disruption to Pupils and shall co-operate fully with any reasonable requests made by the Department relating to this. For the avoidance of doubt the Department will be entitled to request that where the NMSS cannot complete Pupils that it will co-operate in transferring the Pupils to a new provider even if this is prior to the Termination Date or Expiry Date of this Agreement and the NMSS's Exit Plan should reflect this. The Department will not be liable for any costs prior to or after the Termination Date or Expiry Date incurred by the NMSS in complying with this Clause 38.2.
- 38.3 Unless the Department otherwise requires, during the time between service of a notice of termination of this Agreement in whole or in part and such termination taking effect, the NMSS must take all steps, which are necessary and consistent with its continuing obligations, to mitigate any losses, costs, liabilities and expenses which the NMSS may incur as a result of the termination, including to:
- 38.3.1 cancel all capital and recurring cost commitments in connection with the provision of the Services on the most cost-effective terms without fettering the Department's access to Department Data and the Database;
 - 38.3.2 terminate all relevant Agreements or the relevant parts of relevant Agreements with its Sub-Contractors in connection with the provision of Services on the most favourable terms as can be achieved in the particular circumstances, having first ascertained from the Department whether such Agreements are required to be transferred to the Department or any Successor NMSS instead; and
 - 38.3.3 reduce labour costs by the redeployment or release of NMSS's Personnel to the extent possible in the circumstances.
- 38.4 If the NMSS does not fulfil its obligations in accordance with Clause 38.3, the Department will not pay any sums in excess of those which the Department would have paid had such action been taken.

PART 9: GENERAL PROVISIONS

39 PROVISION OF INFORMATION

- 39.1 The Department may share information provided by the NMSS under this Agreement and information about the NMSS or Agreement, with other Government departments, Crown Bodies, Inspectorates, Combined Authorities and local authorities.
- 39.2 In addition to the other requirements to provide information set out in this Agreement, the Department reserves the right to request information from the NMSS in order to exercise its responsibilities and/or to fulfil requirements to provide information to the Secretary of State, to account to Parliament and to

meet European funding requirements (where applicable). On occasion, the Department will require urgent information from the NMSS.

- 39.3 The NMSS must provide the Department or agents acting on its behalf with the information it requires under Clause 39.2 at the times and in the formats specified by the Department. This information will be of sufficient quality to meet the purposes for which it has been requested.
- 39.4 Failure to comply with any request for information under this clause, at all or in the required timescales, will constitute a breach of this Agreement.

40 SERVICE OF NOTICES

- 40.1 Any notice or other document to be given under this Agreement must be in writing and personally delivered, emailed, sent through the Department's electronic portal or sent by first class post to the address of the relevant party, as referred to above or in the case of an email address or correspondence address, as notified by the relevant party in writing from time to time. The notice or communication will be considered delivered as follows:
- 40.1.1 If personally delivered, when handed over to the addressee;
- 40.1.2 if sent by email or through the Department's electronic portal, in the day the email is sent if sent on a Working Day and before 5.00 pm, otherwise the email will be deemed delivered at 9.00 am on the next Working Day;
- 40.1.3 if sent by first class post, on the second Working Day after the day on which it is posted.
- 40.2 All such notices and communications must be in the English language. To prove the giving of a notice or other document it will be sufficient to show that it was despatched.

41 ENTIRE AGREEMENT

41.1 Prior Representations Superseded

- 41.1.1 Except where expressly provided in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

41.2 Acknowledgements

- 41.2.1 Each of the Parties acknowledges that:
- (a) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any

misrepresentation or untrue statement made to it will be any remedy available under this Agreement; and

- (b) this clause will not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Agreement which was induced by fraud, for which the remedies available will be all those available under this Agreement and under the Law governing this Agreement.

42 NO AGENCY

42.1 No Partnership, Joint Venture or Employment

42.1.1 Nothing in this Agreement will be construed as creating a partnership or joint venture or as an agreement of employment between the Department and the NMSS.

42.2 No Agency or Power to Bind

42.2.1 Save as expressly provided otherwise in this Agreement, the NMSS must not be, or be deemed to be, an agent of the Department and the NMSS will not hold itself out as having authority or power to bind the Department in any way.

43 EXERCISE OF STATUTORY AUTHORITY

43.1 Nothing in this Agreement will be construed as a fetter or restriction on the exercise by the Department of its statutory functions.

44 PUBLIC RELATIONS AND PUBLICITY

44.1 The NMSS must not by itself, its employees or agents and shall procure that its NMSS Personnel must not:

44.1.1 take part in any communications with representatives of the press, television, radio or other communications media on any matter concerning this Agreement; and/or

44.1.2 use or make use of the Department's name, logo or other branding without the prior written approval of the Department.

45 AMENDMENTS TO THIS AGREEMENT

45.1 This Agreement will not be amended unless such amendment has been agreed in writing. For the avoidance of doubt this will include any amendments required to effect a Change agreed in accordance with Clause 6 (Changes).

46 WAIVER

46.1 No term or provision of this Agreement will be considered as waived by any Party to this Agreement unless a waiver is given in writing by that Party. No act or omission of either Party shall by itself amount to a waiver of any right or remedy

unless expressly stated by that Party in writing. In particular, no reasonable delay in exercising any right or remedy shall by itself constitute a waiver of that right or remedy.

- 46.2 No waiver under Clause 46.1 will be a waiver of a past or future default or breach, nor will it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

47 SEVERABILITY

- 47.1 If any term, condition or provision contained in this Agreement is held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision will not affect the validity, legality or enforceability of the remaining parts of this Agreement.

48 LAW AND JURISDICTION

- 48.1 This Agreement is governed by the Laws of England and Wales and, subject to Disputes which are properly referred to and resolved in accordance with the Dispute Resolution Procedure, the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

49 DISPOSAL OF ASSETS AND CHANGE OF USE

- 49.1 In respect of Assets whose value exceeds £2,500 including VAT the following provisions shall apply.
- 49.2 For the purposes of this section:
- a. 'Asset' shall mean any property, real or personal, tangible or intangible;
 - b. an Asset shall be considered to have been financed by the Department if it has been acquired wholly or partly with Funds provided by the Department;
 - c. the use of any Asset shall be considered to have changed if the NMSS uses it for any purpose other than for the provision or connected with the delivery of the Provision under the Agreement;
 - d. 'the appropriate proportion thereof' shall be the proportion represented by the amount of Funding provided by the Department to acquire, develop or improve an asset in relation to the entire price paid for its acquisition, or its market value when its development or improvement have been completed.
- 49.3 The NMSS shall ensure that any Asset financed to any extent by the Department is adequately insured.
- 49.4 The NMSS shall inform the Department if it proposes to dispose of, or change the use of, any Asset that has been financed by the Department.
- 49.5 The NMSS shall not dispose of any Asset financed by monies provided by the Department unless it has first obtained the written consent of the Department to such a disposal.
- 49.6 Where the NMSS disposes of the Asset it shall pay the Department whichever is the greater, either the amount of Funding provided by the Department in respect

of the Asset or the net proceeds of any disposal of an Asset, or the appropriate proportion thereof, to the Department unless otherwise agreed with the Department.

- 49.7 If the NMSS changes the use of any such Asset it must be treated as a disposal and the NMSS shall make a payment to the Department in accordance with Clause 49.6 above.
- 49.8 In the event of the NMSS being taken over or merging this will be deemed to be a disposal and the provisions of Clauses 49.4, 49.5 and 49.6 will apply. The Department reserves the right to permit the NMSS to continue to use the relevant Asset or Assets after it has been taken over or merged.
- 49.9 In the event of the NMSS going into liquidation, this Clause 49 will have the effect of a title retention clause and all Assets financed by the Department, or the equivalent portion of their market value will become the property of the Department.
- 49.10 The provisions of this clause shall apply during the Term of this Agreement and after its termination howsoever arising. For the avoidance of doubt where an annual grant is made, the Agreement will not be deemed to have been terminated at the end of its Term if a new grant starts the day after the said Agreement expired. The Department reserves the right to decide when interest in Assets financed by the Department under the terms and conditions of this Agreement shall cease.

50 MITIGATION

- 50.1 The Department and the NMSS will at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Agreement and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of its obligations under this Agreement which would otherwise entitle that Party to relief and/or to claim compensation hereunder.

51 FURTHER ASSURANCE

- 51.1 Each Party must do all things and execute all further documents necessary to give full effect to this Agreement.

52 THIRD PARTY RIGHTS

- 52.1 No term of this Agreement is enforceable under the Agreements (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

53 CONTINUING OBLIGATIONS

- 53.1 Save as otherwise expressly provided in this Agreement:-

- 53.1.1 the termination or expiry of this Agreement will be without prejudice to any accrued rights and obligations under this Agreement as at the Expiry Date or the Termination Date; and
- 53.1.2 the termination or expiry of this Agreement will not affect the continuing rights or obligations of the Department and the NMSS under the Clauses in the table below and/or under any other provision of this Agreement which is expressed to survive expiry or termination or which is required to give effect to such expiry or termination or the consequences of such expiry or termination for a period of six (6) years (or such longer term as may be specified in this Agreement), after such expiry or termination:

Clause	Description
14	Fraud and Irregularity
15.3	Complaints and Feedback
17	Dispute Resolution
20	Data Protection and Protection of Personal Data
23	Freedom of Information and Confidentiality
24	Employees
26	Payment and Audit
28	NMSS's Records and Audit
31	Indemnities and Liability
32	Insurance
37	Consequences of Termination and Expiry
38	Exit Arrangements
44	Public Relations and Publicity
49	Disposal of Assets and Change of Use
Schedule 7	Security & Department Policies
Schedule 8	Exit Arrangements

SCHEDULE 3: NOT USED

SCHEDULE 4: NOT USED

SCHEDULE 5: NOT USED

SCHEDULE 6: NOT USED

SCHEDULE 7: SECURITY & DEPARTMENT POLICIES

Part A: Security

NOT USED

Part B: Department Policies

The following code outlines the standards and behaviours expected from suppliers and grant recipients and reiterate the government's approach to working with suppliers.

[Codes of conduct for suppliers and grant recipients - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

SCHEDULE 8: EXIT ARRANGEMENTS

1 DEFINITIONS

- "Exit Manager"** the person appointed by each party pursuant to Paragraph 3.3 of this Schedule 8 (Exit Arrangements) for managing the NMSS's obligations under Schedule 8 (Exit Arrangements);
- "Exit Plan"** the plan produced and updated by the NMSS during the Agreement Period in accordance with Paragraph 5 of this Schedule 8 (Exit Arrangements);

2 OVERVIEW

- 2.1 The NMSS is required to ensure it performs its obligations to assist in the orderly transition of the Services from the NMSS to the Department and/or any Successor NMSS in the event of termination (including partial termination) or expiry of this Agreement. This will include the transition of the Services to a follow-on agreement with the same NMSS if applicable. This schedule sets out the principles of the exit and service transfer arrangements that are intended to achieve such orderly transition. For the avoidance of doubt, the NMSS will be responsible for the overall management of the exit and service transfer arrangements.

3 CONTRACT LIFE OBLIGATIONS

- 3.1 The NMSS will draw up an Exit Plan in accordance with Paragraph 5.1.
- 3.2 The NMSS will (unless otherwise agreed by the Department in writing) procure that all sub-contracts and other agreements with third parties used exclusively to deliver the Services to the Department, which are necessary to enable the Department and/or any Successor NMSS to perform the Services in accordance with this Agreement or to enable re-provision of the Services, will be assignable and/or capable of novation at the request of the Department to the Department (and/or its nominee) and/or any Successor NMSS upon the NMSS ceasing to provide the Services (or part of them) without restriction (including any need to obtain any consent or approval) or payment by the Department. Where the NMSS uses sub-contracts and other agreements to deliver the Services and these agreements are part of framework agreements that the NMSS has with its third party suppliers, the NMSS will provide sufficient information and assistance to enable the Successor NMSS or the Department to enter into an agreement with such supplier directly.
- 3.3 The NMSS will appoint an Exit Manager. The NMSS's Exit Manager will be responsible for ensuring that the NMSS and its personnel, agents and sub-contractors comply with this schedule. The NMSS will ensure that its Exit Manager has the requisite authority to arrange and procure any

resources of the NMSS as are reasonably necessary to enable the NMSS to comply with the requirements set out in this schedule.

4 OBLIGATIONS TO ASSIST ON RE-PROVISION OF SERVICES OR TRANSFER BACK TO THE DEPARTMENT

4.1 On reasonable notice, the NMSS will on request provide to the Department and/or to its potential Successor NMSS, the following material and information in order to facilitate the preparation by the Department of any invitation to tender and/or to facilitate any potential Successor NMSS undertaking due diligence:

- 4.1.1 details of the Services;
- 4.1.2 an inventory of Department Data (including but not limited to e-portfolios and any other Pupil Files) in the NMSS's possession or control; and
- 4.1.3 all information relating to Transferring Employees required to be provided by the NMSS under this Agreement.

5 EXIT PLAN

5.1 The NMSS will within three (3) months after the Services Start Date maintain an Exit Plan which sets out the NMSS's proposed methodology for achieving an orderly transition of Services from the NMSS to the Department and/or its Successor NMSS on the expiry or termination of this Agreement and which complies with the requirements set out in Paragraphs 5.2 and 5.3 below.

5.2 The Exit Plan will:

- 5.2.1 document how the Services will transfer to the Successor NMSS (which will need to be agreed between the NMSS and the Successor NMSS) and/or the Department, including details of the processes to transfer documentation, Department Data (including e-portfolios and other Pupil records), systems migration, security and the segregation of the Department's technology components from any technology components operated by the NMSS or its sub-contractors (where applicable);
- 5.2.2 set out procedures to deal with requests made by the Department and/or a Successor NMSS for staffing;
- 5.2.3 address each of the issues set out in this schedule to facilitate the transition of the Services from the NMSS to the Successor NMSS and/or the Department with the aim of ensuring that there is no disruption to or degradation of the Services;
- 5.2.4 list software agreements and licence agreements required to deliver the Services.

5.3 The NMSS will review and (if appropriate) update the Exit Plan each year to reflect changes in the Services.

6 TERMINATION OBLIGATIONS

- 6.1 In addition to the obligations as set out in Clauses 36 (Termination) and 37 (Consequences of Termination and Expiry) of the Agreement, the NMSS will comply with all of its obligations contained in the Exit Plan.
- 6.2 Within six (6) months of the Expiry Date (except where the Service will be rolled over to the following Funding Year) or Termination Date:
- 6.2.1 the NMSS will, subject to the requirement to retain one copy for the purpose of compliance with Clause 53 (Continuing Obligations) and the retention requirements of this Agreement, erase from any computers, storage devices and storage media that are to be retained by the NMSS, all Department Data;
 - 6.2.2 the NMSS will return or make available for the Successor NMSS or the Department to use such of the following as is in the NMSS's possession or control:
 - 6.2.2.1 all materials created by the NMSS under this Agreement, the IPRs in which are owned by the Department;
 - 6.2.2.2 details of work volumes and staffing requirements over the twelve (12) month period immediately prior;
 - 6.2.3 the NMSS will:
 - 6.2.3.1 with respect to learning or training in progress, document the current status and stabilising for continuity during transition;
 - 6.2.3.2 provide assistance and expertise as necessary to examine all governance and reports in place for the provision of the Services;
 - 6.2.3.3 answer all reasonable questions from the Department and/or its Successor NMSS regarding the Services;
 - 6.2.3.4 agree with the Department and/or the Successor NMSS a plan for the migration of the Department Data to the Department and/or the Successor NMSS. The NMSS will fully co-operate in the execution of the agreed plan, providing skills and expertise of a reasonably acceptable standard; and
 - 6.2.4 each party will return to the other party all Confidential Information of the other party and will certify that it does not retain the other party's Confidential Information save to the extent (and for the limited period) that such information needs to be retained by the party in question for the purposes of providing or receiving any Services.
- 6.3 Except where this Agreement provides otherwise, all licences, leases and authorisations granted by one party to the other in relation to the Services will be terminated with effect from the Expiry Date or Termination Date.

7 KNOWLEDGE TRANSFER

- 7.1 Three (3) months prior to the Expiry Date of the Agreement (or where the Agreement is terminated within the timescale notified by the Department) the NMSS will upon request:
- 7.1.1 provide for transfer to the Department and/or the Successor NMSS of all knowledge reasonably required for the provision of the Services which may, as appropriate, include information, records and documents including that relating to configuration of software; and
 - 7.1.2 provide the Department and/or Successor NMSS with reasonable access to such members of the NMSS's or its sub-contractors' personnel as have been involved in the development, provision or management of the Services and who are still employed or engaged by the NMSS or its sub-contractors.
- 7.2 To facilitate the transfer of knowledge from the NMSS to the Department and/or its Successor NMSS, the NMSS will provide, upon request, a detailed written explanation of the procedures and operations used to provide the Services, the change management process and other standards and procedures to the operations personnel of the Department and/or the Successor NMSS.
- 7.3 The information which the NMSS will provide, at its own cost, to the Department and/or its Successor NMSS pursuant to Paragraph 7.1 above will include:
- 7.3.1 copies of up-to-date procedures and manuals;
 - 7.3.2 agreements with third party suppliers of goods and services which are to be transferred to the Department/Successor NMSS;
 - 7.3.3 key support contact details for third party supplier personnel under Agreements which are to be assigned or novated to the Department/Successor NMSS pursuant to this schedule;
 - 7.3.4 any relevant interface information.

8 ASSETS, SUB-CONTRACTS AND SOFTWARE

- 8.1 Following notice of termination of this Agreement, the NMSS will not, without the Department's prior written consent:
- 8.1.1 enter into or vary any sub-contract;
 - 8.1.2 enter into or vary any licence for software in connection with the Services.

9 NMSS PERSONNEL

- 9.1 NOT USED.

10 **PAYMENT**

10.1 The provisions of Clause 37 (Consequences of Termination and Expiry) of the Agreement apply.

SCHEDULE 9: SUB-CONTRACTING

General

- 1.1. The NMSS must comply with;
 - 1.1.1. the Funding Rules; and
 - 1.1.2. the Sub-Contractor Policies; and
 - 1.1.3. the Sub-Contracting Funding Rules; and
 - 1.1.4. the Funding Higher Risk Organisations and Subcontractors Policy (hereafter referred to as the “**Funding Higher Risk Organisations Policy**”).
- 1.2. The NMSS must select its Sub-Contractors fairly and without discrimination and must comply with any procurement rules that apply when doing so, including the Public Contracts Regulations 2015 (as may be amended from time to time) where the NMSS is a contracting authority under those regulations.
- 1.3. The NMSS must ensure that proposed Sub-Contractors are of adequate financial standing and have sufficient capacity and capability to deliver the Services that are to be sub-contracted.
- 1.4. When appointing and working with Sub-Contractors the NMSS must have regard to the section headed ‘Selection and procurement of your subcontractors’ within the Sub-Contracting Funding Rules in relation to conflicts of interest.
- 1.5. The NMSS must have a direct contractual relationship by way of a Sub-Contract with all of its Sub-Contractors. The NMSS must ensure that its Sub-Contractors do not Sub-Contract any of the Services further to other suppliers.
- 1.6. The NMSS must not enter into any agreement for Brokerage in relation to the Services under this Agreement.

Requirements for Sub-Contracts

- 1.7. The NMSS must enter into a written Sub-Contract with any supplier that the NMSS is proposing to use as a Sub-Contractor. The NMSS and the Sub-Contractor must enter into the Sub-Contract before the Sub-Contractor commences the delivery of the proposed sub-contracted Services.
- 1.8. The Sub-Contract must include:
 - 1.8.1. terms and conditions substantially the same as those set out in this Agreement, including but not limited to the right for the NMSS to terminate the Sub-Contract if the Sub-Contractor does not pass the annual due diligence checks and such other matters as are set out in the section headed ‘Due diligence requirements’ within the Sub-Contracting Funding Rules;
 - 1.8.2. payment provisions such that the NMSS must pay the Sub-Contractor within 30 days of receiving a valid invoice;
 - 1.8.3. an obligation on the Sub-Contractor to obtain express written permission from the NMSS before enrolling any Learners;

- 1.8.4. an obligation on the Sub-Contractor to fund and support enrolled Learners for the duration of their Learning Programme;
 - 1.8.5. an obligation on the Sub-Contractor to participate in any rectification plan as appropriate in the event that the Sub-Contractor has committed an act which would constitute a material breach of this Agreement (whether or not it is also a breach of the Sub-Contract); and
 - 1.8.6. sanctions on the Sub-Contractor for material breach of the Sub-Contract substantially the same as those set out in this Agreement.
- 1.9. Sub-Contracts must be available at all times for the Department to inspect on request.

NMSS Obligations

- 1.10. The NMSS must make payment to any Sub-Contractor within 30 days of receiving a valid invoice in accordance with the required provisions of the Sub-Contract set out at Paragraph 1.8.2 of this Schedule.
- 1.11. The NMSS must provide a fully completed Sub-Contractor Declaration via [Manage your Education and Skills Funding](#) (MYESF) on at least two occasions per Funding Year by the dates notified to it by the Department. If the NMSS does not have any Sub-Contractors at the specified date it must submit a nil return. If after submission of its most recent Sub-Contractor declaration the NMSS enters into any Sub-Contract within the Funding Year, it must submit an updated Sub-Contractor Declaration to the Department.
- 1.12. The NMSS must publish a policy statement on its public facing website by 31 October in each Funding Year. The policy statement must accord with the provisions of the section headed 'Your policies for subcontracting and fees and charges' within the Sub-Contracting Funding Rules.
- 1.13. The NMSS must manage and monitor its Sub-Contractors in accordance with the relevant Sub-Contract to ensure that the Sub-Contractors deliver the sub-contracted Services to the standard set out in Clause 3 (Service Delivery) of this Agreement.
- 1.14. The NMSS must inform the Department whenever a Sub-Contractor goes into administration or liquidation.
- 1.15. The NMSS must have a contingency plan in place to ensure that there is continuity of Services for existing Learners in the event of any circumstances that may arise that render a Sub-Contractor unable to deliver the sub-contracted Services including but not limited to the expiry or termination of the Sub-Contract.
- 1.16. The NMSS must ensure that a Sub-Contractor that has committed an act which constitutes a material breach of this Agreement (whether or not it is also a breach of its Sub-Contract) participates in any rectification plan as appropriate.
- 1.17. The NMSS must carry out an investigation at its own cost if there is any evidence of a Sub-Contractor having irregular financial or delivery activity and notify the Department of this and of the outcome of any such investigation.

- 1.18. The NMSS must not enter new Sub-Contracting arrangements or increase the value of existing arrangements if any of the following circumstances apply:
 - 1.18.1. Ofsted has rated the NMSS's management and leadership as inadequate;
 - 1.18.2. the outcome of the NMSS's annual financial health assessment is inadequate, unless the Department has provided its written consent to the proposed Sub-Contracting arrangement in advance of a Sub-Contract being entered into;
 - 1.18.3. a Sub-Contractor has been inspected and judged to be inadequate by Ofsted; or
 - 1.18.4. a Sub-Contractor is subject to ongoing intervention or investigation by the Department.

Due Diligence

- 1.19. The NMSS must carry out its own due diligence checks when appointing Sub-Contractors and must take account of the criteria set out in the **Funding Higher Risk Organisations Policy**.
- 1.20. The NMSS must ensure it refreshes the due diligence checks on its sub-contracting arrangements on at least an annual basis, including but not limited to reviewing its Sub-Contracts and the rationale for entering into each Sub-Contract, any fees and charges involved in the delivery of its sub-contracted Services and whether each cost is reasonable and proportionate in accordance with the section headed 'Due diligence requirements' within the Sub-Contracting Funding Rules.
- 1.21. If a Sub-Contractor does not pass the due diligence requirements set out in the section headed 'Due diligence requirements' within the Subcontracting Funding Rules, the NMSS must take action in accordance with that section of the Sub-Contracting Funding Rules.

Sub-Contracting Thresholds

- 1.22. The NMSS must continuously review the size of its sub-contracted Services and ensure this does not exceed the Sub-Contracting Threshold of 25%.
- 1.23. The NMSS must promptly submit an Exemption Case (as defined in the Sub-Contracting Funding Rules) if it anticipates that its Sub-Contracting will exceed the Sub-Contracting Threshold. The NMSS must submit such Exemption Case no less than twelve (12) weeks prior to exceeding the Sub-Contracting Threshold. The Department may consider Exemption Cases that are submitted later if the NMSS provides evidence of exceptional circumstances. The Department reserves the right to decline the NMSS's Exemption Case.
- 1.24. If the NMSS has previously submitted an Exemption Case, it should continue to seek permission to exceed the Sub-Contracting Threshold and must submit an Exemption Case to the Department by no later than 11.59pm on 31 March in each Funding Year. The Department may consider Exemption Cases that are submitted later if the NMSS provides evidence of exceptional circumstances. The Department reserves the right to decline the NMSS's Exemption Case.

- 1.25. The Exemption Case and the NMSS's submission of it must comply with section headed 'Subcontracting threshold and exemption cases' within the Sub-Contracting Funding Rules.
- 1.26. The Department will consider any submitted Exemption Case in accordance with the provisions of the section headed 'Subcontracting threshold and exemption cases' within the Sub-Contracting Funding Rules and will notify the NMSS as to whether or not the Exemption Case is accepted.
- 1.27. The Department expects that any fee retained by the NMSS as a management fee for a Sub-Contract will not exceed 20% of the overall value of the Sub-Contract. In the event that the management fee is in excess of 20% of the overall value of the Sub-Contract the Department reserves the right to require the NMSS to provide further information in relation to the rationale for the management fee and why it represents good value for money.

Financial Thresholds

- 1.28. Where the annual value in any Funding Year of this Agreement exceeds £5 million and the NMSS wants to Sub-Contract one or more of the Services the following provisions apply:
 - 1.28.1. The NMSS will advertise on Contracts Finder all Sub-Contract opportunities arising from or in connection with the provision of the Services above a minimum threshold of £25,000 that arise during the Agreement Period.
 - 1.28.2. Once a Sub-Contract has been awarded, the NMSS will update the notice on Contracts Finder with the details of the successful Sub-Contractor.
 - 1.28.3. In addition to any other management information requirements set out in this Agreement, the NMSS agrees and acknowledges that it will, at no charge, provide timely, full, accurate and complete SME Management Information ("MI) Reports to the Department which incorporate the following:
 - (a) The total revenue received directly from the Agreement
 - (b) The total value of Services under the Agreement that have been sub-contracted (including revenues for non-SMEs/non-VCSEs);and
 - (c) The total value of sub-contracted revenues to SMEs and VCSEs.
 - 1.28.4. The SME Management Information Reports will be provided in the correct format as required by the Department and any guidance issued by the Department from time to time
- 1.29. If the aggregate total of all Sub-Contractors delivering ESFA funded provision on the NMSS's behalf exceeds or is anticipated to exceed £100,000 in any academic year, the NMSS must meet the requirements detailed in [ESFA subcontracting standard - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100000/esfa-subcontracting-standard.pdf). The £100,000 threshold includes Apprenticeships, ESFA-Funded Adult Education Budget and 16 to 19 provision sub-contracted by the NMSS.

Departmental Rights

- 1.30. In the event that the NMSS fails to comply with any of the requirements set out in this Schedule the Department reserves the right to take such remedial action under this Agreement as it considers appropriate in the circumstances, which may include but is not limited to requiring the NMSS to terminate an existing Sub-Contract and/or prohibiting the NMSS from entering enter into any new Sub-Contract to deliver the Services under this Agreement.